MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

June 15, 2018 through July 30, 2018

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

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FIRST EDITION

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
STEPHEN J. MARKMAN	2021
Justices	
BRIAN K. ZAHRA	2023
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2025
RICHARD H. BERNSTEIN	2023
KURTIS T. WILDER	2019
ELIZABETH T. CLEMENT	2019

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner

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SHARI M. OBERG	AARON J. GAUTHIER
DEBRA A. GUTIERREZ-McGUIRE	STACI STODDARD
ANNE-MARIE HYNOUS VOICE	MARK E. PLAZA
MICHAEL S. WELLMAN	MOLLY E. HENNESSEY
GARY L. ROGERS	REGINA T. DELMASTRO
SAMUEL R. SMITH	CHRISTOPHER M. THOMPSON

CHRISTOPHER M. SMITH

State Court Administrator

MILTON L. MACK, Jr.

Clerk: LARRY S. ROYSTER
Reporter of Decisions: KATHRYN L. LOOMIS
Crier: JEFFREY A. MILLS

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
CHRISTOPHER M. MURRAY	2021
Chief Judge Pro Tem	
JANE M. BECKERING	2019
Judges	
DAVID SAWYER	2023
WILLIAM B. MURPHY	2019
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2019
JOEL P. HOEKSTRA	2023
JANE E. MARKEY	2021
PETER D. O'CONNELL	2019
PATRICK M. METER	2021
KIRSTEN FRANK KELLY	2019
KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2019
DEBORAH A. SERVITTO	2019
ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2023
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2019
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2019
THOMAS C. CAMERON	2019
JONATHAN TUKEL	2019
ANICA LETICA	2021[1]

Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

[1] From June 18, 2018.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2021
2.	JOHN M. DONAHUE	2023[1]
	CHARLES T. LaSATA	2023
	ANGELA PASULA	2019
	SCOTT SCHOFIELD	2021
3.	DAVID J. ALLEN	2021
	MARIAM BAZZI	2021
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	ULYSSES W. BOYKIN	2021
	KAREN Y. BRAXTON	2019
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2023
	JAMES R. CHYLINSKI	2023
	ROBERT J. COLOMBO, Jr.	2019
	KEVIN J. COX	2019
	MELISSA ANNE COX	2023
	PAUL JOHN CUSICK	2019
	CHRISTOPHER D. DINGELL	2021
	PRENTIS EDWARDS, Jr.	2019
	CHARLENE M. ELDER	2021
	VONDA R. EVANS	2021
	WANDA EVANS	2023
	EDWARD EWELL, Jr.	2019
	PATRICIA SUSAN FRESARD	2023
	SHEILA ANN GIBSON	2023
	JOHN H. GILLIS, Jr.	2021
	ALEXIS GLENDENING	2023
	DAVID ALAN GRONER	2023
	RICHARD B. HALLORAN, Jr.	2019

[1] To June 29, 2019.

		Term Expires January 1 of
	ADEL A. HARB	2019
	CYNTHIA GRAY HATHAWAY	2023
	DANA MARGARET HATHAWAY	2019
	DANIEL ARTHUR HATHAWAY	2021
	THOMAS M.J. HATHAWAY	2023
	CHARLES S. HEGARTY	2019
	CATHERINE HEISE	2019
	SUSAN L. HUBBARD	2023
	MURIEL D. HUGHES	2023
	EDWARD JOSEPH	2021
	CONNIE MARIE KELLEY	2021
	TIMOTHY MICHAEL KENNY	2023
	DONALD KNAPP	2021
	QIANA D. LILLARD	2019
	KATHLEEN M. McCARTHY	2019
	BRUCE U. MORROW	2023
	JOHN A. MURPHY	2023
	LYNNE A. PIERCE	2021
	LITA MASINI POPKE	2023
	KELLY RAMSEY	2023
	MARK T. SLAVENS	2023
	LESLIE KIM SMITH	2019
	VIRGIL C. SMITH	2019
	MARTHA M. SNOW	2023
	CRAIG S. STRONG	2021
	BRIAN R. SULLIVAN	2023
	LAWRENCE S. TALON	2021
	CARLA TESTANI	2021
	DEBORAH A. THOMAS	2019
	MARGARET MARY VANHOUTEN	2021
	SHANNON N. WALKER	2021
4.	SUSAN E. BEEBE JORDAN	2023
	RICHARD N. LAFLAMME	2023
	JOHN G. McBAIN, JR.	2021
	THOMAS D. WILSON	2019
5.	AMY McDOWELL	2021
6.	JAMES M. ALEXANDER	2021
	MARTHA ANDERSON	2021
	LEO BOWMAN	2019
	MARY ELLEN BRENNAN	2021
	RAE LEE CHABOT	2023
	LISA ORTLIEB GORCYCA	2021

		Term Expires January 1 of
	NANCI J. GRANT	2021
	HALA Y. JARBOU	2023
	SHALINA D. KUMAR	2021
	DENISE LANGFORD-MORRIS	2019
	LISA LANGTON	2023
	JEFFREY S. MATIS	2021
	CHERYL A. MATTHEWS	2023
	KAREN D. McDONALD	2019
	PHYLLIS C. McMILLEN	2019
	DANIEL PATRICK O'BRIEN	2023
	WENDY LYNN POTTS	2019
	VICTORIA ANN VALENTINE	2023
	MICHAEL D. WARREN, Jr.	2019
7.	DUNCAN M. BEAGLE	2023
	CELESTE D. BELL	2019
	JOSEPH J. FARAH	2023
	JUDITH A. FULLERTON	2019
	JOHN A. GADOLA	2021
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2023
	MICHAEL J. THEILE	2021
	RICHARD B. YUILLE	2021
8.	SUZANNE KREEGER	2021
	RONALD J. SCHAFER	2023
9.	PAUL J. BRIDENSTINE	2019
	GARY C. GIGUERE, Jr.	2021
	STEPHEN D. GORSALITZ	2023
	PAMELA L. LIGHTVOET	2019
	ALEXANDER C. LIPSEY	2023
10.	JANET M. BOES	2019
	JAMES T. BORCHARD	2023
	ANDRÉ R. BORRELLO	2023
	DARNELL JACKSON	2019
	MANVELL TRICE, III	2021
11.	WILLIAM W. CARMODY	2021
12.	CHARLES R. GOODMAN	2021
13.	KEVIN ELSENHEIMER	2021
	THOMAS G. POWER	2023
14.	TIMOTHY G. HICKS	2023
	KATHY HOOGSTRA	2021
	WILLIAM C. MARIETTI	2023
	ANNETTE ROSE SMEDLEY	2019

		Term Expires January 1 of
15.	P. WILLIAM O'GRADY	2021
16.	JAMES M. BIERNAT, Jr.	2019
	RICHARD L. CARETTI	2023
	DIANE M. DRUZINSKI	2021
	JENNIFER FAUNCE	2019
	JAMES M. MACERONI	2021
	CARL J. MARLINGA	2023
	RACHEAL RANCILIO	2023
	EDWARD A. SERVITTO, Jr.	2019
	MICHAEL E. SERVITTO	2023
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2021
	JOSEPH TOIA	2021
	KATHRYN A. VIVIANO	2023
	TRACEY A. YOKICH	2019
17.	PAUL J. DENENFELD	2023
	KATHLEEN A. FEENEY	2021
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	DEBORAH McNABB	2023
	GEORGE JAY QUIST	2023
	J. JOSEPH ROSSI	2023
	PAUL J. SULLIVAN	2021
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2021
18.	HARRY P. GILL	2023
	JOSEPH K. SHEERAN	2021
19.	DAVID A. THOMPSON	2021
20.	KENT D. ENGLE	2023
	JON H. HULSING	2021
	KAREN J. MIEDEMA	2023
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2023
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2023
	PATRICK J. CONLIN, Jr.	2021
	TIMOTHY P. CONNORS	2019
	CAROL ANNE KUHNKE	2019
	DAVID S. SWARTZ	2021
23.	DAVID C. RIFFEL	2023

		Term Expires January 1 of
24.	DONALD A. TEEPLE	2021
25.	JENNIFER MAZZUCHI	2021
26.	MICHAEL G. MACK	2021
27.	ROBERT D. SPRINGSTEAD	2019
28.	WILLIAM M. FAGERMAN	2021
29.	MICHELLE M. RICK	2023
	RANDY L. TAHVONEN	2021
30.	ROSEMARIE ELIZABETH AQUILINA	2021
	LAURA BAIRD	2019
	CLINTON CANADY, III	2023
	WILLIAM E. COLLETTE	2021
	JOYCE DRAGANCHUK	2023
	JAMES S. JAMO	2019
	JANELLE A. LAWLESS	2021
31.	DANIEL J. KELLY	2021
	CYNTHIA A. LANE	2023
	MICHAEL L. WEST	2019
32.	MICHAEL POPE	2021
33.	ROY C. HAYES, III	2021
34.	ROBERT BENNETT	2023
35.	MATTHEW J. STEWART	2021
36.	KATHLEEN BRICKLEY	2019
	JEFFREY J. DUFON	2021
37.	JOHN A. HALLACY	2019
	TINA YOST JOHNSON	2023
	BRIAN KIRKHAM	2023
	SARAH SOULES LINCOLN	2021
38.	MARK S. BRAUNLICH	2019
	MICHAEL A. WEIPERT	2023
	DANIEL WHITE	2021
39.	ANNA MARIE ANZALONE	2019
	MARGARET MURRAY-SCHOLZE NOE	2021
40.	NICK O. HOLOWKA	2023
	BYRON KONSCHUH	2021
41.	MARY BROUILLETTE BARGLIND	2023
	CHRISTOPHER S. NINOMIYA	2021
42.	MICHAEL J. BEALE	2021
	STEPHEN CARRAS	2019
43.	MARK A. HERMAN	2023
44.	MICHAEL P. HATTY	2019
	DAVID READER	2023
45.	PAUL E. STUTESMAN	2019

		Term Expires January 1 of
46.	COLIN G. HUNTER	2023
	GEORGE J. MERTZ	2021
47.	JOHN B. ECONOMOPOULOS	2023
48.	MARGARET BAKKER	2023
	ROBERTS KENGIS	2021
49.	KIMBERLY L. BOOHER	2021
	SCOTT P. HILL-KENNEDY	2019
50.	JAMES P. LAMBROS	2019
51.	SUSAN K. SNIEGOWSKI	2021
52.	GERALD M. PRILL	2021
53.	SCOTT LEE PAVLICH	2023
54.	AMY G. GIERHART	2019
55.	THOMAS R. EVANS	2021
	ROY G. MIENK	2019
56.	JANICE K. CUNNINGHAM	2019
	JOHN DOUGLAS MAURER	2021
57.	CHARLES W. JOHNSON	2019

DISTRICT JUDGES

		Term Expires January 1 of
1.	TERRENCE P. BRONSON	2019
	JACK VITALE	2023
2A.	JONATHAN L. POER	2021
	LAURA J. SCHAEDLER	2023
2B.	SARA S. LISZNYAI	2021
3A.	BRENT R. WEIGLE	2021
3B.	JEFFREY C. MIDDLETON	2021
	ROBERT PATTISON	2019
4.	STACEY A. RENTFROW	2021
5.	GARY J. BRUCE	2023
	ARTHUR J. COTTER	2021
	DONNA B. HOWARD	2021
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2023
7.	ARTHUR H. CLARKE, III	2021
	MICHAEL T. McKAY	2023
8.	ANNE E. BLATCHFORD	2019
	CHRISTOPHER HAENICKE	2019
	KATHLEEN P. HEMINGWAY	2021
	JULIE K. PHILLIPS	2021
	RICHARD A. SANTONI	2021
	VINCENT C. WESTRA	2023
10.	PAUL K. BEARDSLEE	2021
	SAMUEL I. DURHAM, Jr.	2023
	FRANKLIN K. LINE, Jr.	2021
	JAMES D. NORLANDER	2019
12.	JOSEPH S. FILIP	2023
	DANIEL GOOSTREY	2019
	MICHAEL J. KLAEREN	2021
	R. DARRYL MAZUR	2021
14A.	RICHARD E. CONLIN	2021
	J. CEDRIC SIMPSON	2019
	KIRK W. TABBEY	2023
14B.	CHARLES POPE	2021

		Term Expires January 1 of
15.	JOSEPH F. BURKE	2019
	ELIZABETH POLLARD HINES	2023
	KAREN Q. VALVO	2021
16.	SEAN P. KAVANAGH	2021
	KATHLEEN J. McCANN	2019
17.	KAREN KHALIL	2023
	CHARLOTTE L. WIRTH	2021[1]
18.	SANDRA A. CICIRELLI	2019
	MARK A. McCONNELL	2021
19.	L. EUGENE HUNT, Jr.	2023
	SAM A. SALAMEY	2019
	MARK W. SOMERS	2021
20.	MARK J. PLAWECKI	2021
	DAVID TURFE	2019
21.	RICHARD L. HAMMER, Jr.	2021
22.	SABRINA JOHNSON	2019
23.	GENO SALOMONE	2019
	JOSEPH D. SLAVEN	2021
24.	JOHN T. COURTRIGHT	2021
	RICHARD A. PAGE	2023
25.	GREGORY A. CLIFTON	2021
	DAVID J. ZELENAK	2023
27.	RANDY L. KALMBACH	2019
28.	JAMES A. KANDREVAS	2021
29.	LAURA REDMOND MACK	2019
30.	BRIGETTE R. OFFICER-HILL	2023
31.	ALEXIS G. KROT	2021
32A.	DANIEL S. PALMER	2021
33.	JENNIFER COLEMAN HESSON	2023
	JAMES KURT KERSTEN	2021
	MICHAEL K. McNALLY	2019
34.	TINA BROOKS GREEN	2019
	BRIAN A. OAKLEY	2023
	DAVID M. PARROTT	2021
35.	MICHAEL J. GEROU	2023
	RONALD W. LOWE	2019
	JAMES A. PLAKAS	2021
36.	LYDIA NANCE ADAMS	2023
	ROBERTA C. ARCHER	2019
	CHRISTOPHER MICHAEL BLOUNT	2019
	NANCY McCAUGHAN BLOUNT	2021
	IZETTA F. BRIGHT	2023
	DEMETRIA BRUE	2021

[1] To June 15, 2018.

		Term Expires January 1 of
	ESTHER LYNISE BRYANT-WEEKES	2021
	DONALD COLEMAN	2019
	KAHLILIA YVETTE DAVIS	2023
	DEBORAH GERALDINE FORD	2023
	RUTH ANN GARRETT	2019
	AUSTIN WILLIAM GARRETT	2023
	RONALD GILES	2021
	ADRIENNE HINNANT-JOHNSON	2021
	SHANNON A. HOLMES	2021
	PATRICIA L. JEFFERSON	2021
	KENYETTA STANFORD JONES	2023
	ALICIA A. JONES-COLEMAN	2019
	KENNETH J. KING	2021
	DEBORAH L. LANGSTON	2019
	WILLIAM McCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2023
	CYLENTHIA L. MILLER	2023
	DAVID PERKINS	2023
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	AILYAH SABREE	2019
	MICHAEL E. WAGNER	2021
	LARRY D. WILLIAMS, Jr.	2023
37.	JOHN M. CHMURA	2019
	MICHAEL CHUPA	2021
	SUZANNE M. FAUNCE	2023
	MATTHEW P. SABAUGH	2019
38.	CARL F. GERDS, III	2021
39.	JOSEPH F. BOEDEKER	2021
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2023
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2021
41A.	MICHAEL S. MACERONI	2021
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2023
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2021
	CARRIE LYNN FUCA	2023
	SEBASTIAN LUCIDO	2019
42-1.	DENIS R. LeDUC	2021
42-2.	WILLIAM H. HACKELL, III	2019
43.	CHARLES G. GOEDERT	2021
	KEITH P. HUNT	2019
	JOSEPH LONGO	2023

		Term Expires January 1 of
44.	DEREK W. MEINECKE	2019
	JAMES L. WITTENBERG	2023
45.	MICHELLE FRIEDMAN APPEL	2023
	DAVID M. GUBOW	2021
46.	CYNTHIA ARVANT	2023
	SHEILA R. JOHNSON	2021
	DEBRA NANCE	2019
47.	JAMES BRADY	2021
	MARLA E. PARKER	2023
48.	MARC BARRON	2023
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2021
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2021
	PRESTON G. THOMAS	2023
	CYNTHIA THOMAS WALKER	2021
51.	TODD A. FOX	2019
	RICHARD D. KUHN, Jr.	2021
52-1.	ROBERT BONDY	2019
	THOMAS DAVID LAW	2023
	TRAVIS REEDS	2021
52-2.	JOSEPH G. FABRIZIO	2021
	KELLEY RENAE KOSTIN	2023
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2023
	JULIE A. NICHOLSON	2021
52-4.	KIRSTEN NIELSEN HARTIG	2023
	MAUREEN M. McGINNIS	2021
53.	THERESA M. BRENNAN	2021
	L. SUZANNE GEDDIS	2023
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2023
	STACIA J. BUCHANAN	2019
	HUGH B. CLARKE, Jr.	2023
	FRANK J. DeLUCA	2019
54B.	RICHARD D. BALL	2023
	ANDREA ANDREWS LARKIN	2019
55.	DONALD L. ALLEN	2023
	THOMAS P. BOYD	2021
56A.	JULIE O'NEILL	2023
	JULIE H. REINCKE	2021
56B.	MICHAEL LEE SCHIPPER	2019
57.	WILLIAM A. BAILLARGEON	2019
	JOSEPH S. SKOCELAS	2021
58.	CRAIG E. BUNCE	2019
	SUSAN A. JONAS	2021

		Term Expires January 1 of
	BRADLEY S. KNOLL	2021
	JUDITH K. MULDER	2023
59.	PETER P. VERSLUIS	2023
60.	HAROLD F. CLOSZ, III	2021
	MARIA LADAS HOOPES	2021
	RAYMOND J. KOSTRZEWA	2019
	GEOFFREY THOMAS NOLAN	2023
61.	DAVID J. BUTER	2021
	MICHAEL J. DISTEL	2019
	CHRISTINA ELMORE	2023
	JENNIFER FABER	2023
	JEANINE NEMESI LaVILLE	2019
	KIMBERLY A. SCHAEFER	2021
62A.	PABLO CORTES	2021
	STEVEN M. TIMMERS	2019
62B.	WILLIAM G. KELLY	2021
63.	JEFFREY J. O'HARA	2021
	SARA J. SMOLENSKI	2021
64A.	RAYMOND P. VOET	2021
64B.	DONALD R. HEMINGSEN	2021
65A.	MICHAEL E. CLARIZIO	2021
65B.	STEWART D. McDONALD	2021
66.	WARD L. CLARKSON	2019
	TERRANCE P. DIGNAN	2021
67-1.	DAVID J. GOGGINS	2021
67-2.	MARK W. LATCHANA	2023
	JENNIFER J. MANLEY	2021
67-3.	VIKKI BAYEH HALEY	2021
67-4.	MARK C. McCABE	2021
	CHRISTOPHER ODETTE	2019
67-5.	WILLIAM H. CRAWFORD, II	2019
	G. DAVID GUINN	2021
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2021
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2023
	ELIAN FICHTNER	2019
70-2.	ALFRED T. FRANK	2021
	DAVID D. HOFFMAN	2019
71A.	LAURA CHEGER BARNARD	2021
71B.	KIM DAVID GLASPIE	2021
72.	MICHAEL L. HULEWICZ	2023
	JOHN D. MONAGHAN	2019
	CYNTHIA SIEMEN PLATZER	2021
74.	MARK E. JANER	2023
	TIMOTHY J. KELLY	2019

		Term Expires January 1 of
	DAWN A. KLIDA	2021
75.	MICHAEL CARPENTER	2021
76.	ERIC JANES	2021
77.	PETER JAKLEVIC	2021
78.	H. KEVIN DRAKE	2021
79.	PETER J. WADEL	2021
80.	JOSHUA M. FARRELL	2021
82.	RICHARD E. NOBLE	2021
84.	AUDREY D. VAN ALST	2021
86.	THOMAS J. PHILLIPS	2019
	MICHAEL STEPKA	2023
89.	MARIA I. BARTON	2021
90.	JAMES N. ERHART	2021
92.	BETH GIBSON	2021
93.	MARK E. LUOMA	2021
94.	STEVE PARKS	2021
95A.	JEFFREY G. BARSTOW	2021
95B.	JULIE ANN LaCOST	2019
96.	ROGER W. KANGAS	2021
	KARL WEBER	2023
97.	MARK A. WISTI	2021

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2020
CARL F. JARBOE	2020
THEODORE A. METRY	2020
MATTHEW R. RUMORA	2020

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2019
Alger/Schoolcraft	CHARLES C. NEBEL	2019
Allegan	MICHAEL L. BUCK	2019
Alpena	THOMAS J. LaCROSS	2019
Antrim	NORMAN R. HAYES	2019
Arenac	RICHARD E. VOLLBACH, Jr.	2019
Baraga	TIMOTHY S. BRENNAN	2019
Barry	WILLIAM M. DOHERTY	2019
Bay	JAN A. MINER	2019
Benzie	JOHN MEAD	2019
Berrien	BRIAN BERGER	2019
Berrien	MABEL JOHNSON MAYFIELD	2021
Branch	KIRK A. KASHIAN	2019
Calhoun	MICHAEL L. JACONETTE	2023
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa	ERIC BLUBAUGH	2021
Clare/Gladwin	MARCY A. KLAUS	2019
Clinton	LISA SULLIVAN	2019
Crawford	MONTE BURMEISTER	2019
Delta	ROBERT E. GOEBEL, Jr.	2019
Dickinson	THOMAS D. SLAGLE	2019
Eaton	THOMAS K. BYERLEY	2019
Emmet/Charlevoix	VALERIE SYNDER	2019
Genesee	JENNIE E. BARKEY	2021
Genesee	F. KAY BEHM	2019
Gogebic	JOEL L. MASSIE	2019
Grand Traverse	MELANIE STANTON	2019
Gratiot	KRISTIN M. BAKKER	2019
Hillsdale	MICHELLE SNELL BIANCHI	2019
Houghton	FRASER T. STROME	2019

County		Term Expires January 1 of
Huron	DAVID L. CLABUESCH	2019
Huron	DAVID B. HERRINGTON	2021
Ingham	R. GEORGE ECONOMY	2019
Ingham	RICHARD JOSEPH GARCIA	2021
Ionia	ROBERT SYKES, Jr.	2019
Iosco	CHRISTOPHER P. MARTIN	2019
Iron	C. JOSEPH SCHWEDLER	2019
Isabella	WILLIAM T. ERVIN	2019
Jackson	DIANE M. RAPPLEYE	2019
Kalamazoo	TIFFANY ANKLEY	2021
Kalamazoo	CURTIS J. BELL	2019
Kalamazoo	G. SCOTT PIERANGELI	2023
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	TERENCE ACKERT	2023
Kent	PATRICIA D. GARDNER	2019
Kent	G. PATRICK HILLARY	2019
Kent	DAVID M. MURKOWSKI	2021
Keweenaw	JAMES G. JAASKELAINEN	2019
Lake	MARK S. WICKENS	2019
Lapeer	JUSTUS C. SCOTT	2019
Leelanau	LARRY J. NELSON	2019
Lenawee	GREGG P. IDDINGS	2019
Livingston	MIRIAM CAVANAUGH	2019
Luce/Mackinac	W. CLAYTON GRAHAM	2019
Macomb	KATHRYN A. GEORGE	2021
Macomb	SANDRA A. HARRISON	2019
Manistee	THOMAS N. BRUNNER	2019
Marquette	CHERYL L. HILL	2019
Mason	JEFFREY C. NELLIS	2019
Mecosta/Osceola	TYLER O. THOMPSON	2019
Menominee	DANIEL E. HASS	2019
Midland	DORENE S. ALLEN	2019
Missaukee	CHARLES R. PARSONS	2019
Monroe	FRANK L. ARNOLD	2021
Monroe	CHERYL E. LOHMEYER	2019
Montcalm	CHARLES W. SIMON, III	2019
Montmorency	BENJAMIN T. BOSLER	2019
Muskegon	GREGORY C. PITTMAN	2019
Muskegon	BRENDA E. SPRADER	2023
Newaygo	GRAYDON W. DIMKOFF	2019
Oakland	JENNIFER S. CALLAGHAN	2023

County		Term Expires January 1 of
Oakland	LINDA S. HALLMARK	2019
Oakland	DANIEL A. O'BRIEN	2021
Oakland	KATHLEEN A. RYAN	2023
Oceana	BRADLEY G. LAMBRIX	2019
Ogemaw	SHANA A. LAMBOURN	2019
Ontonagon	JANIS M. BURGESS	2019
Oscoda	KATHRYN JOAN ROOT	2019
Otsego	MICHAEL K. COOPER	2019
Ottawa	MARK A. FEYEN	2019
Presque Isle	DONALD J. McLENNAN	2019
Roscommon	MARK JERNIGAN	2019
Saginaw	PATRICK J. McGRAW	2019
Saginaw	BARBARA L. METER	2021
St. Clair	ELWOOD L. BROWN	2021
St. Clair	JOHN TOMLINSON	2019
St. Joseph	DAVID C. TOMLINSON	2019
Sanilac	GREGORY S. ROSS	2021
Shiawassee	THOMAS J. DIGNAN	2019
Tuscola	NANCY THANE	2019
Van Buren	DAVID DiSTEFANO	2019
Washtenaw	DARLENE A. O'BRIEN	2019
Washtenaw	JULIA OWDZIEJ	2021
Wayne	JUNE E. BLACKWELL-HATCHER	2019
Wayne	DAVID BRAXTON	2021
Wayne	FREDDIE G. BURTON, Jr.	2019
Wayne	JUDY A. HARTSFIELD	2021
Wayne	TERRANCE A. KEITH	2021
Wayne	LISA MARIE NEILSON	2023
Wayne	LAWRENCE PAOLUCCI	2023
Wayne	FRANK S. SZYMANSKI	2019
Wexford	EDWARD VAN ALST	2019

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Arenac	Standish	23
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SUPREME COURT CASES

PEOPLE v RANDOLPH

Docket No. 153309. Argued on application for leave to appeal November 7, 2017. Decided June 15, 2018.

Andrew M. Randolph was convicted after a jury trial in the Genesee Circuit Court, Geoffrey L. Neithercut, J., of second-degree murder, MCL 750.317; discharging a firearm into a building, MCL 750.234b; being a felon in possession of a firearm, MCL 750.224f; and possessing a firearm during the commission of a felony, MCL 750.227b, in connection with the fatal shooting of Vena Fant, his girlfriend's mother. The night before the shooting, defendant had fought with his girlfriend and packed his belongings into bags before departing. Fant then brought these bags to the home of defendant's father, Alphonso Taylor. After the shooting, without a search warrant, the police obtained Taylor's consent to search the bags, which contained several rounds of ammunition. An arrest warrant was later issued and executed on defendant at his brother's apartment, where a search revealed a handgun linked to the killing. At trial, the prosecution's case relied in part on testimony about threats defendant had made to the victim's family on the day of the shooting and evidence of the ammunition and gun found during the investigation. Regarding the threats, Linda Wilkerson, the sister of Fant's fiancé, testified that Fant said that defendant had been calling throughout the day and threatening to kill the family. Defense counsel did not object to this testimony, nor did he object to the admission of the ammunition and gun as evidence. Defendant appealed his convictions, arguing that his counsel had been ineffective, and the Court of Appeals remanded the case to the trial court for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). At the hearing, defendant's father, Taylor, testified that he had not touched defendant's bags or received defendant's permission to open them and that when the police searched the bags, they never asked whether Taylor had permission to go through them. Trial counsel admitted that he had no strategic reason for failing to file a motion to suppress the ammunition found at Taylor's house. After the hearing, the trial court rejected defendant's ineffective-assistance claim, ruling that counsel's performance was not deficient and that, in any case, defendant was not prejudiced.

Defendant appealed on this basis and also on the basis of the unpreserved alleged errors by the trial court relating to the admission of evidence. The Court of Appeals, SAWYER, P.J., and K. F. KELLY and FORT HOOD, JJ., affirmed in an unpublished per curiam opinion issued November 24, 2015 (Docket No. 321551), holding in part that defendant could not establish his ineffective-assistance claim because he had not established that plain error had occurred. The Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 500 Mich 999 (2017).

In a unanimous opinion by Justice VIVIANO, the Supreme Court, in lieu of granting leave to appeal, *held*:

A defendant's inability to establish that the trial court committed a plain error does not necessarily preclude the defendant from establishing the ineffective assistance of counsel on the basis of that same error. The standards for establishing plain error by the trial court and ineffective assistance of trial counsel have separate legal elements that focus on different facts. Accordingly, courts must independently analyze each claim, even if the subject of a defendant's ineffective-assistance claim relates to the same error. Because the Court of Appeals failed to apply the standards set forth in *Strickland v Washington*, 466 US 668 (1984), to defendant's ineffective-assistance claims, the Court of Appeals' holdings as to those claims were reversed and the case was remanded to the Court of Appeals to review those claims under the *Strickland* framework in light of the trial record and the record produced at the *Ginther* hearing.

1. Under *Strickland*, establishing ineffective assistance requires a defendant to show that trial counsel's performance was objectively deficient and that the deficiencies prejudiced the defendant. Prejudice means a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The plain-error standard set forth in *People v Carines*, 460 Mich 750 (1999), which governs unpreserved errors at trial, has four elements: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) the plain error affected substantial rights, and (4) the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. A "clear or obvious" error under the second prong is one that is not subject to reasonable dispute. The third element generally requires a showing of prejudice, i.e., that

the error affected the outcome of the lower-court proceedings. Under *Carines*, it is the trial court's unobjected-to error that is the subject of plain-error review, whereas the ultimate determination of an ineffective-assistance claim under *Strickland* is whether the defendant has suffered a genuine deprivation of the right to effective assistance of counsel. Accordingly, plain-error claims and ineffective-assistance claims have their own elements and require different analyses. Furthermore, an appellate court need not look beyond the trial court record when reviewing a trial court's mistake for plain error, whereas the errors underlying ineffective-assistance claims often are not apparent from the trial record and require additional evidentiary development. Accordingly, courts should address ineffective-assistance claims based on the pertinent inquiry—the effect of counsel's deficient performance—considering the pertinent facts, which may include facts developed at an evidentiary hearing.

2. The Court of Appeals impermissibly conflated the plain-error and ineffective-assistance standards when analyzing the admission of the ammunition and murder weapon. Defendant argued on appeal that this evidence was the fruit of an unlawful search under the Fourth Amendment because his father lacked actual or apparent authority to consent to the police officers' request to search his belongings. The Court of Appeals held that defendant did not meet his burden of establishing a plain error affecting his substantial rights regarding the impropriety of the search and introduction of the allegedly illegal fruits of that search. The panel's analysis suggested that any error was not readily apparent from the record and therefore not obvious under *Carines*. But defendant also challenged his counsel's effectiveness relating to the introduction of this evidence, specifically alleging that his counsel's failure to move to suppress the evidence constituted deficient performance and that it prejudiced him. The panel did not evaluate counsel's performance or the prejudice that resulted from it at all, instead relying on its plain-error analysis to conclude that the related ineffective-assistance claims must also fail. However, whether an error was obvious to the trial court is not an element of an ineffective-assistance claim. Given the centrality of the gun and ammunition to the prosecution's case, any ineffective assistance resulting in their admission might have prejudiced defendant. The proper analysis would have applied *Strickland*'s two prongs and asked whether counsel's failure to object to the evidence constituted prejudicial deficient performance.

3. The Court of Appeals also erred by conflating the plain-error and ineffective-assistance standards when analyzing the admission of Fant's statements through the testimony of her fiancé's sister, Linda Wilkerson. Wilkerson testified that Fant said that defendant had been threatening Fant's family. Defendant contended on appeal that those hearsay statements were inadmissible and that the trial court erroneously admitted them as excited utterances. In its plain-error analysis of this issue, the Court of Appeals rejected defendant's argument because any error in admitting the testimony was not clear or obvious given defendant's failure to object. However, the fact that any error was not obvious did not justify rejecting defendant's ineffective-assistance claim; rather, the relevant questions for the Court were whether counsel's failure to object was deficient performance and whether it prejudiced defendant. The Court of Appeals alternatively concluded that any plain error in admitting Wilkerson's statements did not affect defendant's substantial rights, given that the statements were evidence of premeditation but the jury acquitted defendant of first-degree murder. This conclusion could have been reached only by properly applying the *Strickland* test, which requires consideration of defense counsel's actions and their effect in light of all of the evidence relating to that claim, including that developed at any evidentiary hearing, and that proper application was not evident in the Court's opinion.

Court of Appeals judgment reversed in part; case remanded to the Court of Appeals for further proceedings.

Justice CLEMENT took no part in the decision of this case.

CONSTITUTIONAL LAW — INEFFECTIVE ASSISTANCE OF COUNSEL — UNDERLYING ERROR.

A defendant's inability to establish that the trial court committed an error that was plain under *People v Carines*, 460 Mich 750 (1999), does not preclude the defendant from establishing a claim of ineffective assistance of counsel that is based on that same error; courts should analyze ineffective-assistance claims under the standards set forth in *Strickland v Washington*, 466 US 668 (1984), by assessing the effect of counsel's deficient performance considering the pertinent facts, which may include facts developed at an evidentiary hearing.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Joseph F. Sawka*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Eve Brensike Primus* and *Michael L. Mittlestat*) for defendant.

Amicus Curiae:

Mark Reene, *Kym L. Worthy*, *Jason W. Williams*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

VIVIANO, J. This case requires us to consider whether a defendant's failure to satisfy the plain-error test in connection with a legal mistake by the trial court necessarily precludes the defendant from establishing the ineffective assistance of his trial counsel relating to that same mistake. Because these standards of review have separate legal elements that focus on different facts, we hold that a failure to satisfy the plain-error test will not, without more, foreclose a defendant's claim of ineffective assistance of trial counsel. This is true even when the subject of each claim is the same. Therefore, even when a defendant cannot succeed on a claim being reviewed for plain error, courts may not simply conclude, without independent consideration, that a defendant is unable to succeed on an ineffective-assistance claim relating to the same underlying issue.

In the instant case, the Court of Appeals conflated the two standards of review, and therefore failed to properly analyze defendant's ineffective-assistance claims. Therefore, we reverse the Court of Appeals' holdings regarding those claims and remand the case to that Court for reconsideration of those claims in light of the analysis below.

I. FACTS AND PROCEDURAL HISTORY

Defendant lived with his girlfriend, Kanisha Fant. They quarreled throughout the night of December 9,

2012, with defendant making various threats against Fant's family. At some point, he packed his belongings into bags but left them behind when he departed. Kanisha's mother, Vena Fant, brought the bags to the home of defendant's father, Alphonso Taylor.

The next day, gunshots struck Vena's home. One bullet pierced Vena's neck, killing her. After the police arrived, defendant showed up at the scene and was taken into custody. The police lacked sufficient evidence to charge defendant, however, and he was released. The same day, without a search warrant, the police obtained Taylor's consent to search the bags containing defendant's belongings. They found several rounds of .357 ammunition. The Bureau of Alcohol, Tobacco, Firearms, and Explosives was alerted, and it obtained an arrest warrant for defendant's violation of federal law prohibiting a felon (which he was) from possessing ammunition.

In February 2013, an arrest warrant was issued and executed on defendant at his brother's apartment, where defendant had been staying. Because his brother was on parole, the police searched the apartment based on his brother's parolee status.[1] During the search, they found a handgun linked to the homicide.

Defendant was charged with first-degree premeditated murder and felony-firearm, among other things. The prosecution's case relied, in part, on testimony about threats defendant had made to the victim's family on December 10 and evidence of the ammunition and gun found during the investigation. Regarding the threats, Linda Wilkerson, the sister of Vena's fiancé, testified that Vena said that defendant, through-

[1] See Mich Admin Code, R 791.7735(2) (permitting a parole agent to conduct a warrantless search of a parolee's property when the agent has reasonable cause to believe a parole violation exists).

out the day, had been calling and threatening to kill the family. Vena told Wilkerson that everyone needed to be alert. Defense counsel did not object to this testimony, nor did he object to the admission of the ammunition and gun.

Defendant was convicted of the lesser offense of second-degree murder, MCL 750.317, discharging a firearm into a building, MCL 750.234b, being a felon in possession of a firearm, MCL 750.224f, and possessing a firearm during the commission of a felony, MCL 750.227b. On appeal, defendant argued, among other issues, that his trial counsel was constitutionally ineffective, and the Court of Appeals remanded to the trial court for a *Ginther*[2] hearing.[3] Defendant's father, Taylor, testified at the hearing that defendant was not living at his house when Vena brought defendant's belongings there, and, in fact, had never lived there. Taylor was told to give the bags to defendant, and he testified that he never touched the bags or received defendant's permission to open them. When the police searched the items, they never asked if Taylor had permission to go through them. Trial counsel admitted at the hearing that there was no strategic reason for failing to file a motion to suppress the ammunition found at Taylor's house. He simply thought defendant lacked standing to make such a claim.

The trial court rejected defendant's claim of ineffective assistance of trial counsel, finding that counsel's performance was not deficient and that, in any case, defendant was not prejudiced. Defendant appealed. He also raised a host of unpreserved errors, asking that they be reviewed for plain error. For the reasons

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] *People v Randolph*, unpublished order of the Court of Appeals, entered March 26, 2015 (Docket No. 321551), p 1.

discussed below, the Court of Appeals affirmed defendant's conviction, finding neither his claims of trial court error nor his claim of ineffective assistance persuasive.[4] Defendant sought leave to appeal in this Court, and we ordered briefing on "whether a defendant's failure to demonstrate plain error precludes a finding of ineffective assistance of trial counsel; and, in particular, . . . whether the prejudice standard under the third prong of plain error . . . is the same as the *Strickland* [*v Washington*] prejudice standard . . . ."[5]

II. STANDARD OF REVIEW

Questions of law, such as the applicability of legal doctrines to a given set of facts, are reviewed de novo.[6]

III. ANALYSIS

The issue in this case involves the relationship between the standards for reviewing unpreserved claims that the trial court erred (which are reviewed for plain error) and related claims that trial counsel was constitutionally ineffective. Does a defendant's failure to demonstrate the former preclude him or her from being able to demonstrate the latter? This question arises because it is not uncommon for a defendant to challenge the same underlying error through both frameworks.[7] Here, for example, defendant

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[4] *People v Randolph*, unpublished per curiam opinion of the Court of Appeals, issued November 24, 2015 (Docket No. 321551), pp 6-10.

[5] *People v Randolph*, 500 Mich 999 (2017), citing *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[6] *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010); *People v Thousand*, 465 Mich 149, 156; 631 NW2d 694 (2001).

[7] See, e.g., *Gordon v United States*, 518 F3d 1291, 1298 (CA 11, 2008) (noting that an "unobjected-to error" subject to plain-error review could be articulated as a claim of ineffective assistance); *Rhoades v State*, 848

claims that the trial court's admission of the murder weapon and ammunition was plain error, while also claiming that his trial counsel's failure to object to the admission of that evidence constitutes ineffective assistance. Thus his basic challenge to the admission of the evidence is made in two separate claims for relief. He approaches the admission of Vena's statements similarly, contending on the one hand that the trial court plainly erred by admitting them, and on the other hand that his attorney was constitutionally deficient for allowing that error to happen. Does defendant's inability to satisfy the plain-error test preclude him from satisfying the Sixth Amendment test when he is complaining about the same underlying mistake?

Our analysis begins with a simple examination of the elements of each standard of review. Under *Strickland v Washington*, establishing ineffective assistance requires a defendant to show (1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the defendant.[8] Prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[9]

NW2d 22, 33 (Iowa, 2014) (Mansfield, J., concurring) (noting that while Iowa does not recognize a plain-error rule, "[i]n some respects, we are using ineffective assistance as a substitute for a plain error rule"); see also *United States v Saro*, 306 US App DC 277, 281; 24 F3d 283 (1994) ("[T]here is a natural analogy between the assertion of 'plain error' and the assertion of ineffective assistance of counsel.").

[8] *Strickland*, 466 US at 688; see also *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994) (adopting the *Strickland* test as the standard for ineffective assistance under Michigan's Constitution).

[9] *Strickland*, 466 US at 694.

Our plain-error standard, governing unpreserved errors at trial, derives from federal law.[10] As we noted in *People v Carines*, the test has four elements:

> 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) . . . the plain error affected substantial rights . . . [, and 4)] once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.[11]

A "clear or obvious" error under the second prong is one that is not "subject to reasonable dispute."[12] The third *Carines* element "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings."[13]

As an initial matter, the specific error that is the focus of each standard is different. It is the trial court's unobjected-to error that is the subject of plain-error review.[14] By contrast, the "ultimate determination" of an ineffective-assistance claim "is not the propriety of the trial court's actions with regard to an alleged error,

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[10] See *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994) (adopting the plain-error test for unpreserved nonconstitutional errors from *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993)).

[11] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (rearticulating the *Olano*/*Grant* standard and applying it to unpreserved constitutional errors) (quotation marks and citation omitted).

[12] *Puckett v United States*, 556 US 129, 135; 129 S Ct 1423; 173 L Ed 2d 266 (2009).

[13] *Carines*, 460 Mich at 763.

[14] See, e.g., *Saro*, 24 F3d at 286 ("Obviousness" for purposes of plain-error review "is assessed from the perspective of the trial court; the error must be 'so "plain" the trial judge and prosecutor were derelict

but whether defendant has suffered a genuine deprivation of his right to effective assistance of counsel . . . ."[15] There will no doubt be occasions when both standards are relevant; trial counsel's deficient performance will often result in a trial court error, but the claims associated with each type of error have their own elements and require different analyses. In evaluating a trial court's error the appellate court is making one determination, and in evaluating trial counsel's deficient performance, the determination is different.[16]

The tests for each determination reflect their differences. The first two prongs of the plain-error standard require that an error exist and that it be obvious.[17] Neither of these alone satisfies either *Strickland* prong. A trial court's error does not tell us (1) whether counsel performed deficiently with respect to that trial court error or (2) if counsel's performance was deficient, whether it prejudiced the defendant.[18] The obvi-

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in countenancing it, even absent the defendant's timely assistance in detecting it.' "), quoting *United States v Frady*, 456 US 152, 163; 102 S Ct 1584; 71 L Ed 2d 816 (1982).

[15] *Deck v State*, 68 SW3d 418, 428 (Mo, 2002).

[16] See generally *United States v Carthorne*, 878 F3d 458, 465 (CA 4, 2017) ("Plain error review by appellate courts is used 'to correct only particularly egregious errors' by a trial court. . . . By comparison, the ineffective assistance inquiry on collateral review does not involve the correction of an error by the district court, but focuses more broadly on the duty of counsel to raise critical issues for that court's consideration."); see also *Hagos v People*, 288 P3d 116, 121; 2012 CO 63 (Colo, 2012) ("The two claims serve different purposes and each requires an independent, fact-specific analysis. The [plain-error analysis] addresses whether the prejudice resulted from the trial court's acts or omissions, while the ineffective assistance claim examines whether prejudice resulted from counsel's acts or omissions.").

[17] *Carines*, 460 Mich at 763.

[18] The inverse is true as well. While counsel's failure to object to testimony or argument that the trial court properly admitted might rarely constitute ineffective assistance, see generally *People v Riley*

ousness of the error, the second plain-error test element, is no different. While in some instances an obvious error may correlate with counsel's ineffectiveness in responding to it and the prejudice resulting from that failure, in others instances it will not.

Examples are helpful. A defendant might appeal a trial court's obvious error of permitting a prosecutor to extensively reference the defendant's post-arrest, post-*Miranda*[19] silence,[20] a clear due process violation. But nothing about that obvious error by the court, without more, helps the defendant meet his or her burden in bringing an ineffective-assistance claim, because *Strickland*'s two prongs ask different questions. At issue in a claim of ineffective assistance of counsel is whether counsel's failure to object to the improper evidence was constitutionally deficient, and if so whether that failure prejudiced the defendant. And "[c]ounsel may decide, for strategic reasons, not to object to an obvious error."[21] If counsel's strategy is reasonable, then his or her performance was not deficient.[22]

Conversely, an error's lack of obviousness does not, without more, necessarily preclude an ineffective-

(After Remand), 468 Mich 135, 142; 659 NW2d 611 (2003) ("Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion."), we cannot categorically state that any time a defendant is unable to satisfy the first prong of *Carines*, a *Strickland* claim relating to the same issue must fail, given the different elements of each test.

[19] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[20] See, e.g., *People v Shafier*, 483 Mich 205, 224; 768 NW2d 305 (2009).

[21] *Gordon*, 518 F3d at 1300.

[22] See, e.g., *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) ("In [proving deficient performance], the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy."), citing *Strickland*, 466 US at 690.

assistance claim relating to the same issue. Simply because an error was unclear does not mean that counsel could let it pass without objection. Indeed, an ineffective-assistance claim might allege deficient performance that caused the error to be unclear. For example, an examination of defense counsel's performance might reveal that he or she deficiently failed to develop the record or pursue a line of questioning that would have made an error obvious.[23] In such a case, it would be circular to reject the ineffective-assistance claim on the grounds that the error was not clear under the plain-error standard. Trial counsel's own deficient performance—e.g., his or her failure to develop the record making the error clear—would make it impossible for the defendant to have that unconstitutional performance evaluated.[24]

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[23] See *Ex parte Taylor*, 10 So 3d 1075, 1079 (Ala, 2005) (Stuart, J., concurring) (noting that the trial record might, in certain cases, support a finding of no plain error, but that "on subsequent review of facts developed surrounding counsel's performance with regard to the issue, the more developed record might lead to the conclusion that counsel's errors with regard to making the record for review of the substantive claim" constituted ineffective assistance).

[24] Indeed, the very reason for the plain-error framework, with its extra elements (particularly *Carines*'s fourth prong), is for instances in which defense counsel failed to preserve the argument by raising it in the trial court. See *Carines*, 460 Mich at 764-765 ("[R]equiring a contemporaneous objection provides the trial court 'an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights.' "), quoting *Grant*, 445 Mich at 551; *Deck*, 68 SW3d at 427 ("If no objection was made or the error was otherwise not preserved, then the trial court cannot normally be accused of error in its rulings, much less prejudicial error."). Had the claim been preserved by contemporaneous objection, the error would have been brought to the court's attention and a different standard would guide the reviewing court. And, of course, the failure to object in the first place might itself constitute ineffective assistance.

Each standard does require a showing of prejudice: *Carines*'s third prong and *Strickland*'s second. But even here, a finding that a defendant failed to satisfy the prejudice prong when complaining about an error by the court will not necessarily mean that the defendant is unable to prevail on an ineffective-assistance claim relating to the same underlying issue. In fact, the record on which the claims are assessed will typically be different. An appellate court need not look beyond the trial court record when reviewing a trial court's mistake for plain error; an "appellate court can find and correct the error without any entanglement in contested or unknown facts . . . ."[25] That is the nature of plain-error review.

By contrast, the errors underlying ineffective-assistance claims often are not apparent from the trial record but instead require additional evidentiary development.[26] This is because ineffective-assistance claims center on deficiencies in the defense counsel's decision-making, which will not always reveal themselves in the official record.[27] As the United States Supreme Court has noted, the trial record is "devoted to issues of guilt or innocence" and will often "not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of

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[25] *United States v Caputo*, 978 F2d 972, 974 (CA 7, 1992).

[26] See 3 LaFave, Criminal Procedure (4th ed), § 11.7(e), p 962 ("Appellate courts uniformly note that where a claim of ineffective assistance of trial counsel could be more fully developed by evidence outside the trial record, the preferable procedure is to present it initially in a setting that permits an evidentiary hearing.").

[27] See *Massaro v United States*, 538 US 500, 505; 123 S Ct 1690; 155 L Ed 2d 714 (2003) (noting that it was preferable for ineffective-assistance claims to be brought on collateral review because on direct review the "trial record [is] not developed precisely for the object of litigating or preserving the claim and thus [is] often incomplete or inadequate for this purpose").

commission, the record may reflect the action taken by counsel but not the reasons for it."[28] Further, "[w]ithout additional factual development, . . . an appellate court may not be able to ascertain whether the alleged error was prejudicial."[29] For these reasons, in Michigan, a defendant can seek an evidentiary hearing in the trial court on defense counsel's performance and then bring an ineffective-assistance claim on direct appeal with the benefit of the augmented hearing record.[30]

Because facts outside the trial record could be critical to an ineffective-assistance claim, a court presented with such a claim coupled with a related plain-error argument cannot simply plug in the plain-error prejudice analysis for the ineffective-assistance prejudice analysis. As with the remaining elements of each claim, a court must evaluate the record evidence relevant to each independent legal claim.

Finally, *Carines*'s fourth prong—focusing on manifest injustice—lacks any analogue in the *Strickland* test. In short, the elements of an ineffective-assistance claim evaluate counsel's performance, and while sometimes a trial court's error relating to the same underlying issue will have facts in common with that Sixth Amendment claim, the legal framework for each operates independently. All of this makes sense, given the different types of errors each test is meant to address. There is no easy shortcut when reviewing separate appellate claims of the court's and counsel's errors, even where those errors have as their focus the same underlying issue.

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[28] *Id*.

[29] *Id*.; see also *Gov't of Virgin Islands v Vanterpool*, 767 F3d 157, 163 (CA 3, 2014) (noting that ineffective-assistance claims are not "usually cognizable" on direct review because there typically is not "a record developed enough to assess the efficacy of defense counsel").

[30] *Ginther*, 390 Mich at 443-444.

Our holding here thus does not change the fundamental nature of the analyses for plain error and ineffective assistance. Rather, we merely seek to emphasize that courts should address ineffective-assistance claims based on the pertinent inquiry—the effect of counsel's deficient performance—considering the pertinent facts, which may include facts developed at an evidentiary hearing.

IV. APPLICATION

In this case, we conclude that the Court of Appeals impermissibly conflated the plain-error and ineffective-assistance standards at least twice. The first involved the admission of the ammunition and murder weapon. Defendant contends that this evidence was the fruit of an unlawful search under the Fourth Amendment. According to defendant, the search, which occurred at his father's home, was unlawful because his father lacked actual or apparent authority to consent to the police officers' request to search defendant's bags. The discovery of the ammunition among the belongings resulted in the involvement of the federal agents, which led to the arrest warrant and culminated in the execution of the warrant at defendant's brother's home. The search of that home was possible because of his brother's parolee status. And it was during that search that the murder weapon was found. Thus, according to defendant, the gun and ammunition were only discovered because of the initial illegal search of defendant's belongings and were therefore inadmissible.[31]

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[31] See generally *Segura v United States*, 468 US 796, 804; 104 S Ct 3380; 82 L Ed 2d 599 (1984) ("[T]he exclusionary rule [i.e., the suppression of illegally seized evidence] reaches not only primary evidence obtained as a direct result of an illegal search or seizure, . . . but also

The Court of Appeals held that "defendant has not met his burden of establishing a plain error affecting his substantial rights"[32] regarding the impropriety of the search and introduction of the allegedly illegal fruits of that search, albeit without a perfectly clear explanation for that conclusion. On the one hand, the panel reasoned that defendant might have lacked standing to object to the search because "the fact that defendant left his belongings behind when he fled and never returned suggested that he abandoned his belongings . . . ."[33] But the Court also stated that "[w]hile it is possible that defendant was responsible for having his things transferred to Taylor, such that he may not have abandoned them, the available record lacks sufficient information to make that determination."[34] Finally, the Court observed that "even assuming that the ammunition was found as the result of an illegal search, the record does not contain sufficient information to determine whether the gun was likewise subject to suppression."[35]

It seems the Court's holding was based on *Carines*'s second prong, i.e., any error was not obvious. Indeed, by stating that the "available record [was] insufficient to establish a Fourth Amendment violation,"[36] the Court suggested that any error was not readily apparent from the record.

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evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.' ") (citations omitted); *People v LoCicero (After Remand)*, 453 Mich 496, 508; 556 NW2d 498 (1996) ("The exclusionary rule forbids the use of direct and indirect evidence acquired from governmental misconduct, such as evidence from an illegal police search.").

[32] *Randolph*, unpub op at 6.

[33] *Id*. at 5.

[34] *Id*. at 5-6.

[35] *Id*. at 6.

[36] *Id*. at 5.

But defendant also challenged his counsel's effectiveness relating to the introduction of this evidence. Specifically, he alleged that his counsel's failure to move to suppress the evidence constituted deficient performance and that it prejudiced him. The panel did not evaluate counsel's performance or the prejudice that resulted from it at all, instead relying on its plain-error work: "Similarly, defendant has failed to establish plain error in the admission of the evidence regarding the ammunition, defendant's arrest on the federal warrant, and the guns, and thus his related ineffective assistance of counsel claims must also fail."[37] In other words, defense counsel was not ineffective because the error would not have been obvious to the trial court. Of course, obviousness to the trial court is not an element of the *Strickland* test, nor is it even always relevant. And, as explained previously, an error's obscurity could be due to trial counsel's deficient performance, if he or she failed to develop the record in a manner that would have made the errors clear. Given the centrality of the gun and ammunition to the prosecution's case, any ineffective assistance resulting in their admission might have prejudiced defendant. The proper analysis would apply *Strickland*'s two prongs and ask whether counsel's failure to object to the evidence constituted prejudicial deficient performance.

The Court of Appeals made the same mistake in its evaluation of the admission of Vena's statements through the testimony of her fiancé's sister, Wilkerson. According to Wilkerson, Vena claimed that defendant had been threatening Vena's family. Defendant has contended on appeal that those hearsay statements

[37] *Id*. at 10.

were inadmissible and that the trial court erroneously admitted them as excited utterances.[38]

In its plain-error analysis of this issue, the Court of Appeals rejected defendant's argument for two reasons. First, it concluded that any error in admitting the testimony was not clear or obvious given defendant's failure to object.[39] Second, as an alternative rationale, the Court reasoned that any plain error "did not affect defendant's substantial rights"—i.e., did not prejudice defendant—because "[Vena's] statement to Wilkerson was evidence that the subsequent shooting was done with a premeditated intent to kill, but defendant was acquitted of first-degree murder and convicted of second-degree murder, which was supported by other evidence unrelated to this hearsay statement."[40]

Defendant also claimed that his attorney was ineffective for failing to object to this hearsay evidence. In its consideration of that question, the Court simply noted that defendant's claim "must fail" because his plain-error claim failed.[41] The Court continued, "Even if we were to accept defendant's claim that Vena's first statement to Wilkerson was inadmissible hearsay, defendant cannot show that he was prejudiced by counsel's failure to object [to the hearsay] for the reasons discussed earlier."[42]

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[38] MRE 803(2) (defining an "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

[39] *Randolph*, unpub op at 4 ("While there is some evidence in the record to suggest that Vena was not overcome by the stress or excitement caused by the threat, that issue was not fully explored due to defendant's failure to object. Therefore, we cannot conclude that any error is clear or obvious.").

[40] *Id*.

[41] *Id*. at 10.

[42] *Id*.

The Court of Appeals' first rationale for rejecting defendant's plain-error claim—that the error was not obvious—cannot justify rejecting defendant's ineffective-assistance claim. Once again, defense counsel's own deficient performance might have cloaked the obviousness of an error (and in fact the panel's reasoning suggests that it might well have), but that failure cannot then preclude an ineffective-assistance claim. The questions the Court needed to answer were whether counsel's failure to object was deficient performance and whether it prejudiced defendant.

The Court's second rationale was that defendant had not established plain error because he could not show that the admission of the statements prejudiced him—specifically, because the hearsay statements were relevant to establishing premeditation but the jury rejected premeditation by acquitting defendant of first-degree murder. But the Court could reach this conclusion only after properly applying *Strickland*, which requires considerations of defense counsel's actions and their effect in light of all of the evidence relating to that claim, including that developed at any evidentiary hearing.

That proper application is not evident in the Court's opinion. The Court parsed the testimony and the claims of error relating to it. It stated that even if "Vena's *first statement* to Wilkerson was inadmissible hearsay," defendant could not show prejudice.[43] It appears that the "first statement" was Vena's comment that defendant had "been calling all day threaten' [sic] to kill the family, especially Lo and Vontay."[44] But Wilkerson also testified that Vena said she might call her son to warn him about the threats. In response to

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[43] *Id*. (emphasis added).

[44] *Id*. at 4 (quotation marks omitted).

the prosecutor's question, " 'How was it that Vena said it?' Wilkerson answered, 'She said, she's like, well, we better watch out. He said he's goin' get us, we better be on the alert. It was more or less like that type of—we better, we better watch out 'cause he said he's goin' get us, he's goin' kill us, he's goin' kill us.' "[45]

The Court of Appeals did not address these additional statements in its ineffective-assistance analysis. But, in its plain-error analysis, the Court rejected defendant's argument because it was unclear whether Wilkerson gave an unresponsive answer or whether she answered by demonstrating the tone and manner in which Vena had made the statements. Seemingly, then, the Court thought any error in admitting this testimony was not clear or obvious (i.e., defendant failed to satisfy *Carines*'s second prong). Again, a defendant's failure to satisfy the second prong of *Carines*'s plain-error test (that the error was obvious) does not foreclose an ineffective-assistance claim, which evaluates questions separate from the obviousness of an error. But other than the error's lack of obviousness, the Court of Appeals offered no other reason for rejecting defendant's ineffective-assistance claim regarding these subsequent hearsay statements from Vena. Consequently, it either failed to address defendant's ineffective-assistance argument concerning the subsequent statements or it once again impermissibly conflated the plain-error and ineffective-assistance analyses.[46]

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[45] *Id*.

[46] To the extent the Court of Appeals held that none of Vena's hearsay statements could have prejudiced defendant under *Strickland* because they were relevant only to premeditation, the Court's opinion is unclear. Nor did the Court ever consider whether the statements could have been relevant for other purposes. Consequently, the Court's failure to apply *Strickland* to the ineffective-assistance claim requires a remand.

These errors are sufficient to require a remand to the Court of Appeals so it can apply the appropriate framework in evaluating defendant's ineffective-assistance claims. On remand, the Court of Appeals shall closely reassess all of defendant's ineffective-assistance arguments under the *Strickland* standard, taking into account the record evidence relevant to that standard.[47]

V. CONCLUSION

In this case we hold that a defendant's inability to satisfy the plain-error standard in connection with a specific trial court error does not necessarily mean that he or she cannot meet the ineffective-assistance standard regarding counsel's alleged deficient performance relating to that same error. Courts must independently analyze each claim, even if the subject of a defendant's claim relates to the same error. Because the Court of Appeals failed to apply *Strickland* to defendant's ineffective-assistance claims, we reverse the Court of Appeals' holdings as to those claims and remand this case to the Court of Appeals to review those claims under the *Strickland* framework in light of the trial record and the record produced at the *Ginther* hearing.

MARKMAN, C.J., and ZAHRA, MCCORMACK, BERNSTEIN, and WILDER, JJ., concurred with VIVIANO, J.

CLEMENT, J., took no part in the decision of this case.

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[47] Because the above discussion is sufficient to resolve this appeal, we decline to consider the second question we asked the parties to brief, i.e., "whether the prejudice standard under the third prong of plain error . . . is the same as the *Strickland* prejudice standard[.]" *Randolph*, 500 Mich at 999.

PEOPLE v TRAVER

Docket No. 154494. Argued on application for leave to appeal December 6, 2017. Decided June 15, 2018.

Gary M. Traver was convicted following a jury trial in the Mackinac Circuit Court of assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, but was acquitted of interfering with electronic communications, MCL 750.540(a), and carrying a concealed weapon (CCW), MCL 750.227. Defendant had an ongoing dispute with his neighbor over the use of their shared driveway, culminating in an altercation between the two men that resulted in defendant being charged with the four offenses. After the jury was sworn in, the court, William W. Carmody, J., gave preliminary oral instructions to the jury, which included the elements of CCW but not the elements of the remaining charges. In addition to the oral instructions, the trial court gave the jury written instructions on the elements of CCW, felonious assault, and interfering with electronic communications, but the written instructions were incomplete with regard to the offense of felony-firearm in that only the definition of possession was included for that offense. Defense counsel approved the instructions on the record. After closing arguments, the trial court orally instructed the jury regarding routine points of law, but the court did not orally instruct regarding the elements of the offenses, stating that the jury had already received written instructions regarding those offenses and the elements for each offense. After objecting to the felony-firearm instruction and requesting and receiving a clarifying instruction regarding that offense, defense counsel indicated that he was satisfied with the instructions. Defendant appealed. In a split decision, the Court of Appeals, GLEICHER, P.J., and M. J. KELLY, J. (SAWYER, J., dissenting), reversed defendant's convictions, reasoning that the trial court's failure to orally instruct the jury regarding the elements of the charged offenses constituted plain error that affected defendant's substantial right to have a properly instructed jury consider the evidence. 316 Mich App 588 (2016). Judge SAWYER dissented, stating that defendant had waived any claim of instructional error by expressing satisfaction with the instructions. The prosecution sought leave

to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the prosecution's application for leave to appeal or take other action. 501 Mich 938 (2017).

In an opinion by Chief Justice MARKMAN, joined by Justices MCCORMACK, BERNSTEIN, WILDER, and CLEMENT, the Supreme Court *held*:

MCR 2.512 and MCR 2.513 require that trial courts provide instructions orally to the jury. In this case, however, defendant waived his claims of instructional error.

1. A court must properly instruct a jury so that the jury may correctly and intelligently decide the case. In that regard, the instructions to a jury must include all the elements of the charged offenses. A complete failure to instruct a jury regarding any of the elements necessary to determine if the prosecution has proven a charge beyond a reasonable doubt constitutes structural error that requires automatic reversal. In contrast, imperfect instructions that omit an element of an offense, or otherwise misinform the jury of an offense's elements, do not necessarily render a criminal trial unfair such that the conviction must be set aside. An imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights. Defense counsel waives any error resulting from an imperfect instruction when counsel explicitly and repeatedly approves the instruction.

2. MCR 2.512(B)(2) provides that before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in MCR 2.512(A)(2), that party's theory of the case. MCR 2.513(A) provides, in part, that after the jury is sworn in, the court must provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case, including instructions regarding the elements of all charged offenses. Similarly, MCR 2.513(N)(1) requires a trial court to instruct the jury as required and appropriate after closing arguments are made. Under MCR 2.513(N)(2), upon concluding the final instructions, the court must invite the jurors to ask any questions in order to clarify the instructions before the jurors retire to deliberate. MCR 2.513(N)(3) requires the trial court to provide a written copy of the final jury instructions for the jury to take into the jury room for deliberation; the court may also provide additional copies of the instructions if requested by any juror and may provide the jury with a copy of electronically recorded instructions.

3. Neither MCR 2.512 nor MCR 2.513 expressly states whether instructions must be provided orally to the jury. When interpreting court rules, the rules must be read in context and as a whole, taking into consideration the grammatical usage of the words in the rule. Reading the word "instruct" in MCR 2.512 and MCR 2.513 in context—that is, the requirement that a trial court must "instruct" the jury—the court rules affirmatively require oral instructions to the jury, even though neither rule expressly states that requirement. In grammatical terms, the MCR 2.513(N)(2) gerund phrase "[u]pon concluding the final instructions" refers to the subject of the sentence—the trial court—and it would not be correct to read the phrase as referring to a jury's reading of written instructions. In addition, the MCR 2.513(N)(2) command that invites jurors to ask clarifying questions, coupled with the subrule's timing element—"[u]pon concluding the final instructions"—suggests that the trial court must read the instructions aloud; a jury would not be able to ask clarifying questions at the conclusion of the final instructions if there were no oral instructions because the jury would not yet be cognizant of what the instructions entailed had the jury just been handed written instructions. The MCR 2.513(N)(3) requirement that the court provide a written copy of the final jury instructions to the jury and the MCR 2.513(N)(3) provision that the trial court may provide electronically recorded instructions also indicate that the final jury instructions must be given orally. MCR 2.513(A) similarly suggests that the initial act of instructing the jury must be oral because the subrule requires the trial court to instruct the jury before trial on all claims and then requires the court to provide each juror with a copy of the instructions. The manner in which MCR 7.312(D)(2)(d) refers to "jury instructions" also supports the conclusion that the court rules require oral instructions.

4. In this case, the trial court erred when it failed to orally instruct the jury regarding the elements of several offenses. The issue did not constitute structural error because the jury was instructed in some form or another on the elements of all the offenses. Instead, because the manner in which the instructions were given constituted nonstructural error, the issue was subject to waiver analysis. Here, defendant waived the claim because defense counsel repeatedly approved the instructions as given. Defendant similarly waived his claim that the trial court failed to instruct the jury regarding felony-firearm, in light of the fact that the trial court further instructed the jury after defense counsel objected to the initial felony-firearm instruction and defense counsel orally approved that additional instruction. Accordingly, although the Court of Appeals correctly concluded that instruc-

tions must be given orally to the jury, the Court of Appeals erred by concluding that defendant was entitled to a new trial because of the instructional error.

Affirmed in part, reversed in part, and remanded to the Court of Appeals for consideration of defendant's previously unaddressed ineffective-assistance-of-counsel claims.

Justice ZAHRA, concurring in part and dissenting in part, agreed with the majority that defendant was not entitled to relief on the basis of his claims of instructional error but disagreed with the majority's conclusion that MCR 2.512 and MCR 2.513 require a trial court to orally deliver instructions to the jury. MCR 2.512(B)(2) and MCR 2.513(N)(1) require the trial court to "*instruct*" the jury. Applying the dictionary definition to those subrules, the plain and ordinary meaning of the transitive verb "instruct" requires the trial court to provide the jury with authoritative information or advice as required and appropriate, including the applicable law, the issues presented, and the party's theory of the case if requested by the party. These subrules do not require the trial court to deliver the instructions orally, and the instructions may therefore be delivered orally or in written form. The court rules plainly allow trial courts the flexibility to accommodate all qualified jurors—especially those with impairments or disabilities for whom written instructions may be more appropriate. Justice ZAHRA disagreed with the majority's conclusion that the MCR 2.513(N)(2) language "[u]pon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate" suggests that the trial court must read those instructions aloud because the jury would not be able to ask clarifying instructions without them. The prepositional gerund phrase "[u]pon concluding the final instructions" functions adverbially because it addresses when the court must invite questions from jurors. While the majority correctly suggests that one logical reading of the sentence includes a trial court orally instructing the jury and then inviting questions from the jurors, that is not the only logical reading because gerunds and participles are often misplaced. The grammatical structure of the sentence could be improved on to better clarify the subject of the prepositional gerund phrase, and its weight as a contextual cue requiring oral instruction is therefore minimal. The MCR 2.513(N)(3) requirement that the jury must be provided a written copy of the final jury instructions and that the trial court may provide electronically recorded instructions does not suggest that the instructions were

originally delivered orally; the subrule does not require that a trial court read the instructions aloud, and providing a copy of the instructions merely allows jurors to not remember every single instruction. The plain language of MCR 2.513(A) similarly does not suggest that preliminary instructions must be delivered orally. The majority's reliance on MCR 7.312(D)(2)(d) is misplaced because if written instructions were provided to the jurors, they would be a relevant portion of the record required to be included in the appendix under that subrule. Although oral instructions are not currently required, the court rules should be amended to require a trial court to provide both oral instructions and written copies of the final instructions.

Justice VIVIANO, concurring in part and dissenting in part, agreed with the majority that defendant was not entitled to relief on the basis of his claims of instructional error but disagreed that a requirement for oral instruction arises contextually within the court rules. While MCR 2.513(N)(2) suggests a sequence of events culminating in jurors being allowed to ask clarifying questions, MCR 2.513(A) and MCR 2.513(N)(3) do not require that the first step in the sequence be oral instructions. The court rules should be amended to require trial courts to provide oral instruction, in conformity with the practice in the federal circuit courts and some states. The purpose of the 2011 amendments of the Michigan Court Rules was to require the trial court to supplement the traditional verbal instructions with a written copy to improve juror comprehension, but the amendment did not make the intention explicit. Because he concluded that the court rules do not presently require oral jury instructions, Justice VIVIANO would not have addressed whether the trial court's failure to provide them was subject to a waiver analysis.

CRIMINAL LAW — JURY INSTRUCTIONS — MANNER OF GIVING INSTRUCTIONS.

The Michigan Court Rules require that jury instructions be provided orally by the trial court (MCR 2.512; MCR 2.513).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, *J. Stuart Spencer*, Prosecuting Attorney, *B. Eric Restuccia*, Deputy Solicitor General, and *Scott R. Shimkus*, Assistant Attorney General, for the people.

Cecilia Quirindongo Baunsoe for defendant.

MARKMAN, C.J. At issue is whether the trial court erred by providing written instructions to the jury concerning elements of the charged offenses but failing to read those instructions aloud. Although we conclude that our court rules require oral instructions, defendant here waived any claims of instructional error. Therefore, we affirm the judgment of the Court of Appeals to the extent that it held that the court rules require oral instructions, but we reverse to the extent that it held that this claim and additional claims of instructional error required reversal of defendant's convictions. In addition, we remand to the Court of Appeals for consideration of defendant's previously unaddressed arguments relating to ineffective assistance of counsel.[1]

I. FACTS AND HISTORY

Defendant shared a driveway with his neighbor, Patrick St. Andre, and the two were involved in an ongoing dispute regarding use of the driveway. As a result of allegations arising from the dispute, defendant was charged with carrying a concealed weapon (CCW), MCL 750.227; assault with a dangerous weapon (felonious assault), MCL 750.82; interference with electronic communications, MCL 750.540(5)(a); and possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. After swearing in the jury, the trial court gave preliminary oral instructions to the jury and stated the following, in relevant part:

> To prove the charges, the prosecutor must prove beyond a reasonable doubt the following information that you have in your hand. I'd ask you to take a look now at what has been passed out to you.

[1] In all other respects, we deny leave to appeal because we are not persuaded that the remaining issues in the prosecutor's application for leave to appeal should be reviewed by this Court.

> In count one, the defendant is charged with the crime of carrying a concealed weapon. To prove this charge, the prosecutor must prove, beyond a reasonable doubt, those elements so listed. First, that the defendant knowingly carried a weapon, a pistol. It does not matter why the defendant was carrying the weapon, but to be guilty of the crime, the defendant must have known that it was a weapon. Second, that this pistol was concealed, complete invisibility is not required. A weapon is concealed if it cannot easily be seen by those who come into ordinary contact with the defendant.
>
> Now, as you can see in count two and count three, and count four, those are the elements, ladies and gentlemen, that you will need to pay attention to during the course of this trial. Those are the four counts that Mr. Traver is charged with, and the attorneys will be discussing all of those as we proceed through here by questions of the witnesses. Okay?

The trial court then provided the jury with a two-page typed document that contained the definition of the term "possession" for felony-firearm and the elements of CCW, felonious assault, and interference with electronic communications; defense counsel expressed satisfaction with these instructions. Following closing arguments, the trial court again orally instructed the jury, but only as to routine points of law, such as the meaning of reasonable doubt and the fact that attorneys' arguments do not constitute evidence. It did not orally instruct regarding the elements of the charges, stating:

> When you go into the jury room, ladies and gentlemen, you will be provided with a written copy of these instructions should you so choose. If there are instructions that I have given and others that I will give that you wish copies of, they will be provided to you. You've already received the charges and the elements of the same.

At the conclusion of these instructions, the trial court inquired whether defense counsel was satisfied, and counsel sought clarification regarding the felony-firearm instruction; the trial court responded with further instructions in that regard. Defense counsel then again expressed satisfaction with the instructions. The jury found defendant guilty of felonious assault and felony-firearm and not guilty of the remaining charges.

Following sentencing, defendant appealed as of right, raising numerous issues—in particular, that the trial court erred by failing to orally instruct the jury on the elements of the charges. In a split decision, the Court of Appeals reversed defendant's convictions, reasoning that the trial court had failed to orally instruct the jury regarding the elements of the charged offenses. *People v Traver*, 316 Mich App 588; 894 NW2d 89 (2016). Judge SAWYER dissented, asserting that defendant had waived any claim of instructional error by expressing satisfaction with the instructions. *Id*. at 603.

The prosecutor then sought leave to appeal in this Court, and on December 6, 2017, we heard oral argument regarding whether to grant the application. Because there was uncertainty regarding the specific written instructions the jury had received, we remanded to the trial court "for appropriate proceedings to settle the record as to the content of the written jury instructions on the elements of the charged crimes." *People v Traver*, 501 Mich 938 (2017). On remand, the trial court determined that the two-page typed document cited by the Court of Appeals was identical to the content provided to the jury by the trial court. We now address the claims of instructional error that the Court of Appeals majority held warranted reversal of defendant's convictions.

II. STANDARD OF REVIEW

"We review de novo claims of instructional error" and "must consider the instructions as a whole, rather than piecemeal, to determine whether any error occurred." *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). Similarly, we review de novo the proper interpretation and application of court rules. *People v Comer*, 500 Mich 278, 289; 901 NW2d 553 (2017). The same broad legal principles governing the interpretation of statutes apply to the interpretation of court rules; therefore, when interpreting a court rule, this Court begins with the text of the court rule and reads the individual words and phrases in their context within the Michigan Court Rules. *Id*.

III. LEGAL BACKGROUND

"A court must properly instruct the jury so that [the jury] may correctly and intelligently decide the case." *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996) (opinion by MALLETT, J.). "The instruction to the jury must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them." *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975) (citations omitted). The pertinent rules governing jury instructions are set forth in MCR 2.512 and MCR 2.513. MCR 2.512 provides, in relevant part:

> (A) Request for Instructions.
>
> (1) At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.

* * *

(B) Instructing the Jury.

(1) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict.

(2) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case.

MCR 2.513 provides, in relevant part:

(A) Preliminary Instructions. After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. . . .

* * *

(N) Final Instructions to the Jury.

(1) Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments. After

> jury deliberations begin, the court may give additional instructions that are appropriate.
>
> (2) Solicit Questions about Final Instructions. As part of the final jury instructions, the court shall advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations. Upon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate.
>
> * * *
>
> (3) Copies of Final Instructions. The court shall provide a written copy of the final jury instructions to take into the jury room for deliberation. Upon request by any juror, the court may provide additional copies as necessary. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions.

In *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000), we addressed a case in which the trial court failed to instruct the jury regarding *any* of the elements of felony-firearm. *Duncan* held that "[i]t is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a *complete failure* to instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt." *Id*. at 48 (emphasis added). We grounded this conclusion in two general concerns with the complete failure to instruct. First, "[s]uch a defect improperly left the jury to speculate, i.e., the absence of *any* instructions regarding the elements of felony-firearm left the jury to guess what the prosecuting attorney might be required to prove." *Id*. at 52-53 (emphasis added). Second, "the failure to provide any of the elements of the charge may have suggested to the jury that the two charges

were [somehow] tie-barred, i.e., if the jury found defendant guilty of murder, they were then to find defendant guilty of felony-firearm." *Id*. at 53. "Such tie-barring would run counter to our fundamental constitutional law as it directs the jury to return a verdict." *Id*. See also *id*. at 54 ("Indeed, this Court has even recognized that a jury is not required to reach consistent verdicts with regard to a felony-firearm charge and the accompanying felony.").

Unlike the situation in *Duncan* in which there was a *complete* failure to provide the jury with instructions regarding *any* of the elements of an offense, in *People v Kowalski*, 489 Mich at 501-503, we addressed the matter of *imperfect* instructions in a context in which the trial court had misinformed the jury by omitting individual elements of the offense. *Kowalski* explained that "[i]nstructional errors that omit an element of an offense, or otherwise misinform the jury of an offense's elements, do not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id*. at 501 (quotation marks and citation omitted). Rather, *Kowalski* proceeded to assert, "[A]n imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *Id*. at 501-502. Furthermore, although "a jury instruction that improperly omits an element of a crime amounts to a constitutional error," such an error is waived when defense counsel "explicitly and repeatedly approved the instruction." *Id*. at 503.

IV. ANALYSIS

Neither MCR 2.512 nor MCR 2.513 expressly states whether instructions must be provided orally, and the

prosecutor contends that the court rules do not require oral instructions. Although the requirement to "instruct" the jury could conceivably be read in isolation as referring to providing *either* oral or written instructions,[2] the context in which the word "instruct" is used in our rules leads us to conclude that the court rules affirmatively require oral instructions. See *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005) ("The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole. When interpreting a court rule or statute, we must be mindful of the surrounding body of law into which the provision must be integrated . . . .") (quotation marks and citation omitted); *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) ("Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context.").

As set forth earlier, MCR 2.513(N)(2) states that "[u]pon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate." This command to invite clarifying questions regarding the final instructions, coupled with the specific timing element—"[*u*]*pon concluding* the final instructions"—suggests that the trial court reads the final instructions aloud. *Id*. (emphasis added). Absent oral instructions, the jury obviously would be incapable of asking "clarifying" questions at that time simply because it would yet be *unaware* of what the instructions entailed. That is, it would only have been

[2] The dictionary defines the word "instruct" as "to provide with authoritative information or advice." *Merriam-Webster's Collegiate Dictionary* (11th ed).

as a result of a prior delivery of oral instructions by the court that a "conclusion" would be reached at which the jury would have been afforded sufficient information upon which to base a question seeking to "clarify" the final instructions. Logically, the jury must be *cognizant* of the final instructions at the point at which the invitation to clarify occurs, and the jury can only be cognizant of the instructions at that point—that is, when the court has "conclud[ed] the final instructions," *id*.—when the instructions have been orally communicated; jurors who still have to read a typed two-page statement after it is delivered to them will not be cognizant of the content of those instructions upon delivery.[3]

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[3] In his partial dissent, Justice ZAHRA suggests that the clause "[u]pon concluding the final instructions" could be read as referring to the jurors' completion of reading the final instructions because the clause lacks an express subject; however, that reading is not only strained but also grammatically incorrect. See *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) ("The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended."); *Comer*, 500 Mich at 289 (stating that the same broad legal principles governing the interpretation of statutes apply to the interpretation of court rules). The relevant portion of MCR 2.513(N)(2) specifies, "Upon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate." As it is employed in MCR 2.513(N)(2), the word "concluding" functions as a gerund. See Garner, *Garner's Modern English Usage* (Oxford: Oxford University Press, 2016), p 1006 (defining "gerund" as "[a] present-participial form that functions as a noun; a verbal noun"). That is, as employed here, "concluding" refers to an event. That event is either the trial court's "concluding the final instructions" or—as Justice ZAHRA suggests—the jurors' "concluding [their consideration of] the final instructions." When a sentence begins with a gerund phrase as the sentence at issue here does, the subject of the phrase must logically agree with the subject of the sentence. See Sabin, *The Gregg Reference Manual* (New York: McGraw-Hill, 2011), ¶ 1082, p 349 ("When a sentence begins with a participial phrase, an infinitive phrase, a gerund phrase, or an elliptical clause (one in which essential words are missing), make sure that the

Moreover, the MCR 2.513(N)(2) language "[*u*]*pon concluding* the final instructions" also communicates that there is some beginning, middle, and ending to the final instructions, a temporal sequence that makes sense only in the context of final instructions being provided to the jury in an oral manner. *Id*. (emphasis added). If the final instructions could be satisfied by merely handing the jury a "two-page typed" document, then the phrase "[u]pon *concluding* the final instructions" would have little coherent meaning because nothing of apparent consequence would have *preceded* the "concluding" moment—indeed the "concluding" instant—at which the court actually provided the written instructions to the jury. *Id*. (emphasis added). It is a questionable use of language to refer to the "conclu[sion]" of a moment, or an instant, at which some action is taken unless that action in some way represents the culmination of some apparent *process* that has *led* to, or brought into *being*, that concluding moment or instant.[4]

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phrase or clause logically agrees with the subject of the sentence; otherwise, the construction will 'dangle.' "); *Garner's Modern English Usage*, pp 241-242 (explaining that "danglers" are problematic with participle phrases and gerund phrases alike; that "danglers" render a sentence incoherent or illogical; and that "[i]n the normal word order, a participial phrase beginning a sentence ('Walking down the street,') should be directly followed by the noun acting as subject in the main clause ('I saw the house')"). In order to have a proper grammatical reading of MCR 2.513(N)(2), the phrase "[u]pon concluding the final instructions" must be read as referring to the subject of the sentence here, which is the trial court. See MCR 2.513(N)(2) ("Upon concluding the final instructions, *the court* shall invite the jurors to ask . . . .") (emphasis added). Given that the trial court is the subject, it would be improper to read "[u]pon concluding the final instructions" as referring to an act of the jury.

[4] Interpreting the rules to solely permit the practice of having the jury read the written instructions to themselves before the court solicits clarifying questions would not only overlook the critical *textual* clues to the contrary in MCR 2.513(N)(2) but would also be inconsistent with the

Furthermore, the notion that the word "instruct" refers to providing oral jury instructions is compellingly underscored by the fact that MCR 2.513(N)(3) provides that "[t]he court shall provide a *written copy of the final jury instructions* to take into the jury room for deliberation." (Emphasis added.) By communicating that the court must provide a "written copy of the final jury instructions," MCR 2.513(N)(3) logically suggests that the final jury instructions were *not* originally provided in "writing" under the requirement in MCR 2.513(N)(1) that "the court must instruct the jury as required and appropriate . . . ." MCR 2.513(N)(3) further provides that "[t]he court, in its discretion, also may provide the jury with a copy of electronically recorded instructions." That the rule contemplates the existence of "electronically recorded instructions" further suggests that the instructions must be provided

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purposes of our court rules. See MCR 1.105 ("These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties."). Absent oral guidance by the court, written jury instructions can hardly be said to advance "the just, speedy, and economical determination of" a case. *Id*. Take the instant case, for example, in which a time-consuming remand was required to settle the record concerning the content of the written jury instructions because the trial court had failed to read the relevant portions of the instructions to the jury, which resulted in the instructions not becoming part of the final transcript. Moreover, allowing written instructions as the sole means of instruction would deprive the jury of the active advice of the trial court and would require jurors to read the instructions in the jury box in open court before they retired; requiring this to be undertaken in the "fishbowl" of open court—with parties, the gallery, and court officers watching and waiting—makes little sense and could easily lead to a less-than-thorough and unreflective reading by the jury. By contrast, requiring oral instructions advances "the just, speedy, and economical determination of" a case given that the full panoply of instructions is explained aloud to the jury with the contents of those instructions included within any subsequent transcript. *Id*. Therefore, oral instructions not only best comport with the text of MCR 2.513(N)(2) but are also most consistent with the purpose of our court rules.

orally. Thus, the references in MCR 2.513(N)(3) to providing "a written copy of the final jury instructions" and to "electronically recorded instructions" both indicate that the jury instructions must initially be given orally.

The court rules provide similar support for oral instructions in MCR 2.513(A), which governs preliminary instructions. MCR 2.513(A) indicates that the jury "shall be instructed about the elements of all civil claims or all charged offenses" and then states that "[t]he court shall provide each juror with a *copy* of such instructions." (Emphasis added.) Implicit, again, in the additional requirement of MCR 2.513(A) to provide a "copy" of the instructions to the jury is the understanding that the trial court orally instructed the jury in the first instance. Thus, as with MCR 2.513(N)(3), MCR 2.513(A) suggests strongly that the initial act of instructing the jury is undertaken orally.

This interpretation is not only supported by the various provisions of MCR 2.513 but also by the manner in which *other* court rules refer to "jury instructions." For example, MCR 7.312(D)(2)(e) requires that an appellant's appendix contain "any relevant portions of the transcript, including the complete jury instructions if an issue is raised regarding a jury instruction." In order for the "complete jury instructions" to have been transcribed and to compose part of the transcript, the jury instructions must have been read aloud.[5] Therefore, references to jury instructions

[5] Similar court rules that govern appeals in circuit courts and the Court of Appeals lend support for the proposition that the court rules require oral instructions. See, e.g., MCR 7.105(B)(5)(b) (stating that to apply for leave to appeal in circuit court, the appellant must file, "unless waived by stipulation of the parties or trial court order, a copy of certain transcripts," including, in an appeal challenging jury instructions, "the transcript of the entire charge to the jury"); MCR 7.205(B)(4)(c) (stating

throughout the court rules seemingly contemplate that the instructions be provided orally.

In summary, when the court rules are read in context and as a whole, it becomes reasonably clear that the commands in MCR 2.512 and MCR 2.513 that direct the trial court to "instruct" the jury refer to providing *oral* instructions.[6]

Nonetheless, in the instant case, although the trial court *failed* to orally instruct the jury regarding the elements of several offenses, defendant, in our judgment, clearly waived his claim of instructional error.[7] As *Kowalski* explained:

> This Court has defined "waiver" as the intentional relinquishment or abandonment of a known right. One who waives his rights under a rule may not then seek appellate

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that to apply for leave to appeal in the Court of Appeals, the appellant shall file with the clerk, "in an appeal challenging jury instructions, the transcript of the entire charge to the jury").

[6] In his partial dissent, Justice ZAHRA concludes that by allowing for *either* oral or written instruction, the court rules provide trial courts with flexibility to accommodate jurors who may have impairments, such as a hearing impairment. However, nothing in our interpretation of the relevant court rules prevents a trial court from providing the necessary accommodations for jurors who may have impairments or disabilities, and it is difficult to envision that a trial court would not affirmatively accommodate a juror who had such an impairment. The trial court simply must provide oral instructions *in addition* to providing such accommodations.

[7] We note that *Duncan*, 462 Mich at 57, which held that a trial court's complete failure to instruct the jury on the elements of the charged offenses constituted structural error requiring reversal, did not address the concept of waiver. However, because the instant case is distinguishable from *Duncan*, we need not address whether the complete failure to instruct would evade a waiver analysis. Unlike *Duncan*, the jury here received instructions in some form or another on the elements of *all* of the offenses—it is only the *manner* in which the instructions were presented that renders them imperfect. As with *Kowalski*, the claim of instructional error here did not amount to structural error—it is a nonstructural error and is clearly subject to a waiver analysis.

> review of a claimed deprivation of those rights, for his waiver has extinguished any error. When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver. [*Kowalski*, 489 Mich at 503 (quotation marks and citations omitted).]

Here, the jury received the document containing the definition of possession for felony-firearm and the elements of CCW, felonious assault, and interference with electronic communications. During the trial court's oral instructions, the trial court told the jury that it had already been provided the charges and the elements of the charges, and at the conclusion, defense counsel was asked whether there were any issues with the final instructions. Defense counsel raised an objection regarding the felony-firearm instruction, and additional instructions were provided. The trial court then asked whether defense counsel and the prosecutor were satisfied, and defense counsel replied, "Yes, your Honor." After the jury was excused, the trial court again asked, "All parties are satisfied with the instructions as given?" Both the prosecutor and defense counsel again responded, "Yes, your Honor." As this Court concluded in *Kowalski*, "by expressly and repeatedly approving the jury instructions on the record, defendant waived any objection to the erroneous instructions, and there is no error to review." *Id*. at 504. Therefore, the Court of Appeals majority erred by concluding that this claim of instructional error warranted a new trial.[8]

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[8] In his partial dissent, Justice ZAHRA asserts that "it makes eminent sense to amend the court rules to require a trial court to provide both an oral recitation and written copies of the final jury instructions." No justice in the majority necessarily disagrees with this proposition. However, the court rules do not yet expressly incorporate such language, and if and when such language is eventually incorporated, it will have

V. OTHER ISSUE

In addition to the above issue, the Court of Appeals majority held that there was a separate claim of instructional error that independently warranted a new trial. Specifically, it held that there had been a complete failure to instruct the jury regarding felony-firearm, which amounted to a structural error requiring reversal under *Duncan*. Here, the document containing written jury instructions that was provided to the jury did not list the full instructions for felony-firearm; rather, the instructions listed under felony-firearm merely pertained to what constitutes possession. However, defense counsel objected to the instructions regarding felony-firearm, and the trial court instructed the jury that "[i]f, for example, you find the defendant not guilty of the other three counts, you cannot find him guilty of the felony firearm. Okay? Because no felony has been committed." In addition, the court explained, "If you do find the defendant guilty in count one, two, or three and understand, in your belief, that a weapon was used to commission [sic] those crimes, then count four [felony-firearm] would be applicable." Following these *additional* instructions, both the prosecutor and defense counsel indicated that they were satisfied with the instructions for felony-firearm.

As with the earlier claim of instructional error, "by expressly and repeatedly approving the jury instructions on the record, defendant waived any objection to the erroneous instructions, and there is no error to review." *Kowalski*, 489 Mich at 504.[9] Given the clear

been undertaken in *conformity* and *continuity* with the existing rules rather than establishing an entirely *new* requirement.

[9] As Judge SAWYER's dissent recognized, there were problems with the trial court's felony-firearm instructions but the claims of instructional

waiver in this case, the Court of Appeals majority erred by holding that this claim of instructional error warranted a new trial.[10]

VI. CONCLUSION

We conclude that Michigan court rules *require* that jury instructions be provided orally. However, defendant waived this claim and any additional claims of instructional error. For that reason, we affirm the judgment of the Court of Appeals but only to the extent that it held that oral jury instructions are required; we reverse to the extent that it held that defendant's claims of instructional error required reversal of his convictions; and we remand to the Court of Appeals for review of defendant's previously unaddressed arguments relating to ineffective assistance of counsel. In all other respects, we deny leave to appeal because we are not persuaded that the remaining question raised by the prosecutor should be reviewed by this Court.

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error were waived. Similar to the previously discussed claim of instructional error, we need not address whether the instant claim potentially evades a waiver analysis. Despite defendant's claimed errors with this instruction, the instant case did not involve a situation in which the trial court entirely omitted any instruction regarding the elements of felony-firearm; accordingly, this case is unlike *Duncan*. Rather, this case—as with *Kowalski*—involves a situation in which the trial court provided imperfect instructions regarding the elements of an offense, and the claimed error is subject to waiver analysis.

[10] The majority further erred by holding that it need not "resort to ineffective assistance of counsel principles to circumvent potential waiver issues . . . ." *Traver*, 316 Mich App at 601. In this case, defendant must establish a valid claim of ineffective assistance of counsel in order for him to be entitled to relief on his waived claims of instructional error. Defendant raised the claims of ineffective assistance in the Court of Appeals, but they were not addressed by the majority. We decline to address them in the first instance and instead remand to the Court of Appeals for consideration of defendant's arguments that defense counsel was constitutionally ineffective to the extent that defendant's claims of instructional error were waived.

MCCORMACK, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred with MARKMAN, C.J.

ZAHRA, J. (*concurring in part and dissenting in part*). The majority holds that MCR 2.512 and MCR 2.513 require a trial court to orally deliver final instructions to the jury after the parties' closing arguments have been made or waived. As a matter of sound policy and practice, I believe Michigan courts should instruct jurors orally and provide jurors written copies of all applicable instructions before they commence deliberations. But the majority's holding is not based on any explicit directive in the court rules. Rather, the majority infers this purported mandate from the syntax of the surrounding text of the pertinent rules. Because the plain language of these rules does not support the proposition that a trial court is required to read aloud the final jury instructions, as opposed to provide the jurors with written instructions, I respectfully dissent.

This Court applies the same legal principles of interpretation and construction applicable to statutes when it construes court rules.[1] Accordingly, we begin by examining the plain language of the rule.[2] In doing so, we must give effect to every word, phrase, and clause in a court rule, and, in particular, consider the plain meaning of the critical word or phrase to avoid rendering any part of the rule nugatory or surplusage if at all possible.[3] If a word or phrase is undefined and lacks a unique legal meaning, it must be accorded its plain and

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[1] *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011); see also *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

[2] *Duncan*, 494 Mich at 723.

[3] Accord *SBC Health Midwest, Inc v Kentwood*, 500 Mich 65, 70-71; 894 NW2d 535 (2017); *In re McCarrick/Lamoreaux*, 307 Mich App 436, 447; 861 NW2d 303 (2014); *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 671; 425 NW2d 80 (1988).

ordinary meaning, for which a lay dictionary may be consulted.[4] There is no need for judicial construction or interpretation if the court rule is unambiguous; the plain meaning of the rule must be enforced as written.[5]

MCR 2.512 (entitled "Instructions to Jury") and MCR 2.513 (entitled "Conduct of Jury Trial") set forth the procedures as they pertain to the trial court delivering jury instructions. In particular, MCR 2.512(B) provides as follows:

> (1) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict.
>
> (2) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case.[6]

Further, MCR 2.513(N) provides, in pertinent part:

> (1) Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests

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[4] See *Duncan*, 494 Mich at 723 ("The Court may refer to dictionaries to aid in discerning the plain meaning of a rule.").

[5] *Id*.

[6] MCR 2.512(A)(2) provides: "In addition to requests for instructions submitted under subrule (A)(1), after the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted."

> before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate.
>
> (2) Solicit Questions about Final Instructions. As part of the final jury instructions, the court shall advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations. Upon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate.
>
> * * *
>
> (3) Copies of Final Instructions. The court shall provide a written copy of the final jury instructions to take into the jury room for deliberation. Upon request by any juror, the court may provide additional copies as necessary. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions.

MCR 2.512(B)(2) requires that the trial court "*instruct* the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case."[7] MCR 2.513(N)(1) similarly requires that the trial court "*instruct* the jury as required and appropriate" after closing arguments have been made or waived.[8] The principal term of interest in both of these rules is "instruct," which *Merriam-Webster's Collegiate Dictionary* defines as "to provide with authoritative infor-

[7] Emphasis added.

[8] Emphasis added.

mation or advice."[9] In according the transitive verb "instruct" its plain and ordinary meaning, the court rules only require that the trial court provide the jury with authoritative information or advice as required and appropriate, which would include the applicable law, the issues presented by the case, and, perhaps, a party's theory of the case. These rules do not, however, require any particular method for delivering this information; a trial court can provide authoritative information in either oral or written form.

As plainly written, the court rules provide trial courts with the flexibility needed to accommodate all qualified jurors, especially those who may have impairments or disabilities. On the one hand, if the jury includes one or more members who are visually impaired, an oral recitation of the final jury instructions would be appropriate and necessary for the trial court to properly discharge its duty to instruct the jury. On the other hand, if the jury includes one or more members who are hearing impaired, oral instructions would most likely be inadequate, and written instruc-

[9] *Merriam-Webster's Collegiate Dictionary* (11th ed), def 2. The transitive verb "instruct" is also defined as "to give knowledge to," *id*., def 1, and "to give an order or command to," *id*., def 3. A court's selection of the proper definition must be guided by the context of the rule in which the term appears. See *People v Shami*, 501 Mich 243, 254 & n 30; 912 NW2d 526 (2018). Therefore, it is important to recognize that the term "instruct" in this context is used to describe the trial court's responsibility with regard to the jury after closing arguments. Because the dictionary uses "the judge *instructed* the jury" as an example for the definition "to provide with authoritative information or advice," *Merriam-Webster's Collegiate Dictionary* (11th ed), def 2, I believe that is the most appropriate definition for determining the plain and ordinary meaning of "instruct" in MCR 2.513(N)(1). Relatedly, *Black's Law Dictionary* defines the phrase "jury instruction" as a "direction or guideline that a judge gives a jury concerning the law of the case." *Black's Law Dictionary* (10th ed). This definition similarly does not dictate oral over written transmission of jury instructions.

tions would be appropriate to accommodate the needs of those jurors.[10] It is precisely this sort of flexibility that complements and accommodates the ever-increasing diversity of juries.

Nevertheless, the majority surmises that the contextual cues in the surrounding text of MCR 2.513 justify its conclusion that the court rules require a trial court to orally deliver final jury instructions. For instance, the majority examines the language in MCR 2.513(N)(2), which states that "[u]pon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate." According to the majority, this language suggests that the trial court must read aloud from the final instructions because the jury would be incapable of asking clarifying questions without those oral instructions. I disagree.

The phrase "[u]pon concluding the final instructions" is a prepositional gerund phrase, insofar as the gerund phrase "concluding the final instructions" is serving as the object of the preposition "[u]pon."[11]

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[10] Another reasonable accommodation might involve providing the juror with a sign-language interpreter. See Frank & Aleinikoff, *Juries and the Disabled*, The Federal Lawyer (Dec 2012), pp 35-36.

[11] Although a present-participial phrase and a gerund phrase both include a verb that ends in *-ing*, there is a distinction between the two. On the one hand, a gerund is a verb that functions as a noun, thereby occupying some positions in a sentence that a noun ordinarily would (e.g., subject, direct object, subject complement, and object of a preposition). See Strunk & White, *The Elements of Style* (4th ed), pp 12-13, 55-56; see also *The Chicago Manual of Style* (16th ed), Rule 5.109 to Rule 5.111. A present participle, on the other hand, is a verb that functions as an adjective. See Strunk & White, *The Elements of Style*, pp 13-14, 93. Accordingly, the difference between participles and gerunds turns on their function. A present-participial phrasing of MCR 2.513(N)(2) looks very similar to the current language of the subrule and would appear as follows: "Concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the

Although a gerund functions as a noun, a prepositional gerund phrase may function as a noun, adjective, or adverb.[12] In this context, the phrase serves an adverbial function; it is addressing *when* the court must invite questions from jurors to clarify any of the final instructions. To avoid confusion, a prepositional gerund phrase should be written in a way that it logically agrees with the subject of the sentence. Thus, the majority is correct in suggesting that one logical reading of this sentence would have the court orally concluding the final instructions, after which the court is then required to invite questions from the jurors. But because participles and gerunds are often misplaced, I am not confident that this is the only logical reading of this sentence. For instance, when the jurors and the trial judge each have their own individual copy of the written jury instructions, this sentence could be read as both the court and the jurors functioning as the subjects of "concluding." In other words, once the court and the jurors have finished reading the instructions, MCR 2.513(N)(2) simply requires that the court then invite the jurors to ask any clarifying questions that they may have regarding those instructions.[13] Because this sentence itself could be improved upon to clarify the subject of the prepositional gerund phrase, I be-

instructions before they retire to deliberate." For this iteration, "concluding" is the present participle and serves the function of an adjective, which then raises the question whether "concluding" is modifying the noun "court," the noun "jurors," or both.

[12] *The Chicago Manual of Style*, Rule 5.173.

[13] The majority also posits that the phrase "[u]pon concluding" communicates a "temporal sequence" that would only make sense in the context of oral instructions. *Ante* at 37. But jurors reading to themselves from written instructions would also have a temporal sequence because reading has "some beginning, middle, and ending," *ante* at 37, such that the trial court would still be able to invite clarifying questions after the jurors had completed reading the written instructions.

lieve the weight given to the majority's implication drawn from this particular contextual cue is minimal and does not necessarily suggest that a trial court is required, in all instances, to orally deliver final jury instructions.[14]

The majority also looks to MCR 2.513(N)(3), which requires that the trial court "provide a written copy of the final jury instructions to take into the jury room for deliberation." According to the majority, providing a written copy of the instructions for the jurors to take with them into the jury room suggests that the instructions were originally delivered orally. The majority also believes that the sentence in this subrule that a trial court "also may provide the jury with a copy of electronically recorded instructions" suggests that the initial instructions were provided orally. I disagree for two reasons.

First, this subrule does not require that a trial court read the instructions aloud. Rather, it speaks only to what is required of the trial court in regard to what jurors may take with them into the jury room when deliberating. In other words, it addresses what is required *after* the trial court provides the final jury instructions following closing arguments and would apply regardless of whether those instructions were provided in oral or written form.[15] Thus, this subrule

[14] The majority claims that permitting jurors to read instructions to themselves would be inconsistent with the purposes of our court rules because, without "oral guidance" from the court, written instructions would not "advance 'the just, speedy, and economical determination of' a case." *Ante* at 38 n 4, quoting MCR 1.105. I question, however, how much "guidance" or "advice" a court is actually providing when it simply reads aloud from the same instructions the jurors could read for themselves.

[15] For this reason, written instructions would not render this subrule surplusage, as the Court of Appeals majority suggested. See *People v Traver*, 316 Mich App 588, 597; 894 NW2d 89 (2016).

would be consistent with providing each juror their own copy of the written instructions, having jurors read those instructions to themselves, having the jurors ask any questions for clarification, and then having the jurors take a single copy of those instructions with them into the jury room when they retire to deliberate.

Second, providing the jurors with a copy of the instructions for reference during deliberations means that jurors are not required to remember every single instruction. Returning to my earlier discussion of a visually impaired juror, however, a copy of the written instructions would not serve this purpose. Accordingly, allowing the option for an "electronically recorded" version of the instructions would serve the same purpose of a written copy of the instructions, thereby enabling a visually impaired juror to refer to those instructions during deliberation.

Next, the majority claims that the language of MCR 2.513(A)—which governs preliminary instructions and states that the trial court "shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case" and "shall provide each juror with a copy of such instructions"—indicates that the trial court orally instructed the jury in the first instance. Not surprisingly, I disagree with this assertion. The plain language of this subrule simply requires the trial court to provide pretrial instructions to the jury and makes clear that each juror is entitled to his or her own individual copy of those instructions. There is nothing in this rule to suggest that preliminary instructions must be delivered orally, let alone that oral delivery of the final jury instructions is required.

Finally, going beyond MCR 2.512 and MCR 2.513, the majority relies on a court rule that governs the preparation of briefs and appendixes for calendar cases to be argued in this Court for further support for its conclusion that a trial court is required to read final jury instructions out loud. Specifically, MCR 7.312(D)(2)(e) addresses the contents of an appellant's appendix, which must contain "any relevant portions of the transcript, including the complete jury instructions if an issue is raised regarding a jury instruction." In order for the jury instructions to become part of a transcript, says the majority, those instructions must have been first read aloud and then transcribed. But this does not mean that the jury instructions must be given orally. Rather, if written instructions were provided to the jurors, they would be a "relevant portion[] of the . . . record" required to be included in the appendix under MCR 7.312(D)(2)(d).

For these reasons, I am not willing to make the same interpretative leap the majority does to read into the plain language of MCR 2.512 and MCR 2.513 a requirement that the trial court must orally deliver final jury instructions. That being said, I believe it makes eminent sense to amend the court rules to require a trial court to provide both an oral recitation and written copies of the final jury instructions. But until such an amendment comes to fruition, I must respectfully dissent.

VIVIANO, J. (*dissenting in part and concurring in part*). The majority holds that MCR 2.512 and MCR 2.513 require a trial court to orally instruct juries. Although I believe wholeheartedly that trial courts should provide oral instructions to juries, I disagree that such a requirement can be gleaned from our rules

in their present form.[1] Therefore, I respectfully dissent from the majority's conclusion to the contrary.

I agree with the majority that "[n]either MCR 2.512 nor MCR 2.513 expressly states whether instructions must be provided orally . . . ."[2] But I disagree that such a requirement arises contextually from our court rules. The majority first examines MCR 2.513(N)(2), which provides that "[u]pon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate." I agree with the majority that the rule suggests a sequence of events in which the instructions are presented to the jurors, who can then ask clarifying questions. But nothing indicates that the first step in the sequence must be oral jury instructions; the trial court could just as well provide written instructions for the jury to read before the jurors are invited to ask questions.

The majority also scrutinizes MCR 2.513(A) and MCR 2.513(N)(3), which require the trial court to provide each juror with a copy of certain preliminary instructions at the beginning of the trial and the entire jury with a copy of the final jury instructions to take into the jury room for deliberation. According to the majority, these rules "suggest[] strongly that the initial act of instructing the jury is undertaken orally."[3] I do not see how, since nothing indicates that the first version of the instructions—from which copies are provided—needs to be oral.

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[1] Several years ago, at my urging, the Court opened an administrative file to consider amending MCR 2.513 to clarify that trial courts must provide juries with oral instructions. I believe we should act with dispatch to clarify our rules to clearly require that jury instructions must be provided orally.

[2] *Ante* at 34-35.

[3] *Ante* at 39.

Even less convincingly, the majority relies on court rules providing what is required to file an appeal—rules that quite explicitly do not govern the conduct of a jury trial. Regardless, these rules do not aid our inquiry because while jury instructions read aloud to the jury would become part of the transcript needed for an appeal, so too could the trial court mark as an exhibit a copy of the written instructions provided to the jurors, which would then become a "relevant portion[] of the . . . record" required to be included in the appendix under MCR 7.312(D)(2)(d).[4]

As I noted at the outset, and despite the foregoing analysis, I strongly believe we should amend our court rules to require trial courts to provide juries with oral instructions. This is already the dominant practice, and has been for some time.[5] Indeed, the federal circuit courts have held that the failure to orally instruct a jury is error.[6] The Third Circuit has explained why this is so:

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[4] For good measure, the majority posits that permitting jurors to read instructions to themselves would be inconsistent with the purposes of our court rules because, without "oral guidance" from the court, written instructions would not "advance 'the just, speedy, and economical determination of' a case." *Ante* at 38 n 4, quoting MCR 1.105. However, this rule is aspirational in nature and does not provide much assistance to our textual analysis of the governing rules.

[5] See *Guam v Marquez*, 963 F2d 1311, 1314 (CA 9, 1992) ("[T]rial judges and litigators have always assumed that jury instructions must be oral."). See also *United States v Robinson*, 724 F3d 878, 887 (CA 7, 2013) ("Our criminal justice system has relied on oral jury instructions since its inception . . . ."), citing Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 Notre Dame L Rev 449, 490-510 (2006).

[6] See, e.g., *United States v Noble*, 155 F2d 315, 318 (CA 3, 1946) (holding that the trial court's failure to orally instruct the jury on the elements was error); *United States v Perry*, 375 US App DC 238; 479 F3d 885 (2007) (same); *Marquez*, 963 F2d at 1314-1315 ("[A]ll jury instructions must be read aloud to the jury in the presence of counsel and the defendant."); *Robinson*, 724 F3d at 887-888 ("[A] trial judge commits

> For not only are counsel and the defendant entitled to hear the instructions in order that they may, if they are incorrect, object to them and secure their prompt correction by the trial judge, but it is equally important to make as certain as may be that each member of the jury has actually received the instructions. It is therefore essential that all instructions to the jury be given by the trial judge orally in the presence of counsel and the defendant. We conclude that the failure in the present case to instruct the jury upon the elements of the crime was error.[7]

Several courts in other states have also held the same.[8]

In 2011, the rules governing the conduct of jury trials in Michigan were amended to incorporate many of the jury reform principles tested in the Court's two-year jury reform pilot project.[9] Under the former jury instruction rule, supplemental written instructions were permitted but not required.[10] As noted above, the current rule now requires that additional written or electronic copies be provided to jurors at the beginning and end of the trial. I believe the purpose of this reform was to require the trial court to supplement the traditional verbal instructions with a written copy

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error if she fails to read aloud jury instructions in their entirety.") (quotation marks and citation omitted); see also 2A Wright & Miller, Federal Practice & Procedure (4th ed), § 483, p 421 ("All instructions to the jury . . . must be announced orally by the judge.").

[7] *Noble*, 155 F2d at 318. Notably, the court concluded that the trial judge would not have fulfilled his duty even if written instructions provided to the jury had fully recited all applicable legal principles. *Id*.

[8] See, e.g., *State v Lamb*, 541 NW2d 457, 462 (ND, 1996) (holding that the court must read oral instructions to the jury). Accord *State v Lindsey*, 245 NJ Super 466, 470-471; 586 A2d 269 (1991); *State v Iosefa*, 77 Hawaii 177, 184; 880 P2d 1224 (1994); *State v Castoreno*, 255 Kan 401, 411-412; 874 P2d 1173 (1994).

[9] See 489 Mich clxxvi, cxcvi (2011) (staff comment).

[10] See MCR 2.516(B)(5), as amended June 2, 1998, 457 Mich xcvi (1998).

to improve juror comprehension.[11] Unfortunately, the language of the rule does not make this intention explicit. And "[i]t is the *law* that governs, not the intent of the lawgiver."[12] Accordingly, I respectfully dissent from the majority's holding that oral jury instructions are required.[13]

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[11] See, e.g., *Robinson*, 724 F3d at 887-888 ("Our criminal justice system has relied on oral jury instructions since its inception, and while there is ample evidence that the increasingly common use of supplementary written instructions can help jurors understand difficult legal concepts, a trial judge commits error if she fails to 'read aloud jury instructions in their entirety[.]' ") (citations omitted). See also Elwork et al, *Making Jury Instructions Understandable* (Charlottesville: The Michie Company, 1982), p 20 ("Several experimenters have shown that vocalization of written material facilitates memory. Thus, the ideal is to present material in both modes at the same time."), citing Murray, *Vocalization at Presentation and Immediate Recall With Varying Methods*, 18 Q J of Experimental Psychol 9 (1966), and Tell & Ferguson, *Influence of Active and Passive Vocalization on Short Term Recall*, 102 J of Experimental Psychol 347 (1974).

[12] Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), p 17.

[13] Because I do not believe that our court rules presently require oral jury instructions, I would not address whether the court's failure to provide them is subject to a waiver analysis.

PEOPLE v WILDER

Docket No. 154814. Argued on application for leave to appeal January 11, 2018. Decided June 15, 2018.

Darrell J. Wilder was tried before a jury in the Wayne Circuit Court on charges of carrying a concealed weapon, MCL 750.227; being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; and possessing a firearm during the commission of a felony (felony-firearm), third offense, MCL 750.227b, after police officers saw defendant standing near a car in a vacant lot with what appeared to be the handle of a handgun sticking out of his pants pocket. The officers saw defendant move the object from his pocket into the trunk of the car, and when the officers opened the trunk, they found a handgun. At trial, defense counsel called defendant's wife, Tameachi Wilder, as a witness. On direct examination, Wilder testified that she had not seen defendant with a gun when he left the house on the date in question, that to her knowledge he did not own a gun, and that she did not have any weapons in the house. She was not asked about and did not offer any other information about defendant's history with guns. On cross-examination, the prosecutor did not question the witness about defendant's possession and ownership of weapons on the day of the crime but instead asked three times whether the witness knew defendant to carry guns. The witness responded "no" to each question. Over defendant's objection, the trial court, Qiana D. Lillard, J., then permitted the prosecutor to question the witness about defendant's prior weapons convictions. The jury found defendant guilty of both felon-in-possession and felony-firearm, but acquitted him of carrying a concealed weapon. Defendant was sentenced to five years' probation for the felon-in-possession charge and 10 years' imprisonment for the third-offense felony-firearm charge. The Court of Appeals, BORRELLO, P.J., and MARKEY and RIORDAN, JJ., affirmed in an unpublished per curiam opinion issued September 27, 2016 (Docket No. 327491), holding that the trial court had not erred by allowing the prosecution's questions. Defendant applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 500 Mich 997 (2017).

In an opinion by Justice VIVIANO, joined by Justices MCCORMACK, BERNSTEIN, and CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

The prosecutor's attempt to impeach a defense witness with evidence of defendant's prior convictions violated several basic tenets of the rules of evidence. Therefore, the portion of the Court of Appeals judgment holding that it was not error to have allowed the cross-examination of that witness concerning her knowledge of defendant's weapons-carrying proclivities and his prior weapons convictions was reversed and the case was remanded to the Court of Appeals to consider whether the error was harmless.

1. The prosecutor's attempt to impeach a defense witness with evidence of defendant's prior convictions was not governed by MRE 609, which applies when a party seeks to impeach a witness's general credibility with evidence that the witness himself or herself has committed a crime. The evidence also was not governed by MRE 608, because it was not opinion or reputation evidence concerning the witness's character for untruthfulness and it did not concern specific instances of the conduct of the witness.

2. MRE 404(b)(1) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith, but it may be admissible for other purposes. Generally speaking, impeachment by contradiction can be a proper purpose for the admission of other-acts evidence. Impeachment of this kind usually occurs when a prosecutor seeks to cross-examine a defendant about prior convictions in order to impeach a defendant's blanket denial on direct examination of ever engaging in conduct similar to the charged conduct. In this case, the prosecutor's initial questions were not logically relevant to a proper purpose under MRE 404(b) because they were not designed to elicit an answer contradicting any statements made by the witness on direct examination. As it pertained to weapons, the witness's direct testimony was limited to whether defendant owned a gun or possessed one on the date in question. This testimony would not have been contradicted even if the witness had acknowledged knowing that defendant generally carried weapons. Therefore, although the prosecutor articulated a proper purpose under MRE 404(b)—impeachment by contradiction—the prosecutor did not establish that the questions asked were logically relevant to impeachment.

3. Absent a proper purpose, evidence of defendant's other acts was inadmissible under MRE 404(a) unless defendant opened the door by introducing evidence of his good character, which he did

not do. The prosecutor's tactic of shifting the focus from the pertinent facts to which the witness testified on direct examination to a broader inquiry about defendant's general weapons proclivities was an impermissible attempt by the prosecutor to open the subject of defendant's character. When a defendant has not offered character evidence, a prosecutor's attempt to elicit character evidence regarding the defendant on cross-examination of another witness is not permitted by MRE 404(a)(1). Although the prosecutor maintained that her second set of questions regarding defendant's prior firearm convictions was appropriate to impeach the witness's response to the first set of improper questions, a party cannot seek to elicit inadmissible character evidence on cross-examination when the opposing party has not opened the door and then claim the right to impeach the elicited denial as a subterfuge to elicit even more inadmissible character evidence. Any other conclusion would eviscerate MRE 404.

Court of Appeals judgment reversed in part; case remanded to the Court of Appeals for further proceedings.

Justice ZAHRA, joined by Chief Justice MARKMAN and Justice WILDER, dissenting, disagreed with the majority's interpretation and application of MRE 404(b), which he stated unduly restricted the discretion of the trial judge. He would have held that the testimony that the witness did not know defendant to carry firearms did not implicate MRE 404(b) because it constituted not other-acts evidence but rather evidence of defendant not performing an act, that defendant's prior convictions were admissible for the noncharacter purpose of impeachment under MRE 404(b), and that the prosecutor's questions about the witness's knowledge of defendant served a valid nonpropensity purpose considering the totality of the circumstances, namely, to rebut the inference that the witness was a credible source of information about defendant.

1. EVIDENCE — OTHER ACTS — PRIOR CONVICTIONS — IMPEACHMENT.

The admissibility of a defendant's prior convictions to impeach a witness's testimony by contradiction is governed by MRE 404(b).

2. EVIDENCE — OTHER ACTS — PRIOR CONVICTIONS — IMPEACHMENT.

Under MRE 404(b), a party cannot seek to elicit inadmissible character evidence on cross-examination when the opposing party has not opened the door and then impeach the elicited denial with further inadmissible character evidence.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Jason W. Williams*, Chief of Research, Training, and Appeals, for the people.

State Appellate Defender (by *Adrienne N. Young* and *Valerie Newman*) for defendant.

VIVIANO, J. This case presents the issue of how and when it is appropriate to impeach by contradiction using other-acts evidence. Because the prosecutor's tactics and questions violated several basic tenets of our rules of evidence, we reverse that part of the Court of Appeals' judgment holding that the cross-examination of defense witness Tameachi Wilder concerning whether she knew of defendant to carry guns and her knowledge of defendant's prior weapons convictions was not error, and we remand this case to the Court of Appeals to consider whether the error was harmless.

I. FACTS AND PROCEDURAL HISTORY

During defendant's trial on charges of carrying a concealed weapon, MCL 750.227; being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; and possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b, he called his wife, Tameachi Wilder, as a witness. On direct examination, the witness testified that she did not see defendant with a gun when he left the house on the date in question, that to her knowledge he did not own a gun, and that she did not have any weapons in the house. She was not asked about and did not offer any other information about defendant's history with guns.

On cross-examination, the prosecutor did not question the witness about defendant's possession and ownership of weapons on the day of the crime but instead asked three times whether the witness knew of defendant to carry guns. The witness responded "no" to each question.[1] Over defendant's objection, the trial court—which mischaracterized both the evidence on direct examination and the witness (referring to her as a character witness rather than a fact witness)—then permitted the prosecutor to question the witness about defendant's prior weapons convictions.[2] At the conclusion of trial, the jury found defendant guilty of both

[1] The precise exchange was as follows:

Q. Do you know of Mr. Wilder to carry weapons?

A. No.

Q. Do you know of him to carry guns?

A. No.

Q. You've been with him for nine years and you don't know of him to carry guns?

A. No.

[2] The precise exchange concerning the first prior conviction was as follows:

Q. And you know that he was convicted of carrying a weapon back then, correct?

A. Yes.

Q. So you knew that he carried weapons, right?

A. No. I didn't know but he was convicted.

Q. Okay. You didn't know that he—you didn't see a weapon in your house?

A. No.

Q. Do you know the circumstances behind that?

felon-in-possession and felony-firearm, but acquitted him of carrying a concealed weapon. The Court of Appeals affirmed defendant's convictions, concluding, among other things, that the trial court had not erred by allowing the prosecutor's questions.[3] After defendant sought leave to appeal in our Court, we ordered oral argument on the application, directing the parties to address, among other things, whether the prosecutor's cross-examination of the witness was proper.[4]

II. STANDARD OF REVIEW

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Preliminary questions of law, including whether a rule of evidence precludes the admission of evidence, are reviewed de novo." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013) (citation omitted).

III. ANALYSIS

The prosecutor sought to impeach a defense witness with evidence of defendant's prior convictions. This tactic was unusual, to put it mildly. In a more typical situation, a party seeks to impeach a witness's general

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A. No.

The prosecutor then asked about the second prior conviction, as follows:

Q. And you know that he was convicted of having a weapon back in August of 2010 too, right?

A. Yes.

Q. Was that gun in your home?

A. No.

[3] *People v Wilder*, unpublished per curiam opinion of the Court of Appeals, issued September 27, 2016 (Docket No. 327491).

[4] *People v Wilder*, 500 Mich 997 (2017).

credibility with evidence that the witness himself or herself has committed a crime, and the admissibility of such evidence is governed by MRE 609.[5] That is not the situation here.[6] The evidence also does not fit under MRE 608, because it is not opinion or reputation evidence concerning the witness's character for untruthfulness and it does not concern specific instances of the conduct of the witness.[7] Therefore, neither of those rules is applicable. That leaves MRE 404 as the rule governing the admission of evidence of defendant's prior acts and convictions. However, for the reasons below, it is abundantly clear that this evidence is also not admissible under Rule 404.

MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes . . . ."[8] Generally speaking, impeach-

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[5] MRE 609(a) provides for the admission of a witness's prior crimes "contain[ing] an element of dishonesty or false statement" or certain crimes "contain[ing] an element of theft" for the purpose of impeaching that witness.

[6] Notably, even if MRE 609 applied, which it clearly does not, defendant's prior weapons offenses are not the type of offenses that the rule contemplates because they do not involve an element of dishonesty, false statement, or theft and thus would not be admissible to attack the witness's credibility.

[7] MRE 608(a) provides for the admission of opinion or reputation testimony regarding a witness's "character for truthfulness or untruthfulness." MRE 608(b) provides that a witness may be questioned regarding prior specific instances of conduct on cross-examination, but only if the prior instances of conduct are probative of "the witness' character for truthfulness or untruthfulness" or "the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

[8] Importantly, MRE 404(b) generally requires the prosecutor to give notice before trial that he or she intends to introduce other-acts evidence:

ment by contradiction can be a proper purpose for the admission of other-acts evidence. See *United States v Copelin*, 302 US App DC 113, 116; 996 F2d 379 (1993) ("Although it is not one of the listed permissible purposes, an attempt to impeach through contradiction a defendant acting as a witness is indisputably a legitimate reason to introduce evidence of other crimes or wrongs."), overruled on other grounds by *United States v Rhodes*, 314 US App DC 117 (1995); see also *People v Taylor*, 422 Mich 407, 414-415; 373 NW2d 579 (1985).[9] Impeachment of this kind usually occurs when a prosecutor seeks to cross-examine a defendant about prior convictions in order to impeach a defendant's blanket denial on direct examination of ever engaging in conduct similar to the charged conduct. See, e.g., *United States v Gilmore*, 553 F3d 266, 271-272 (CA 3, 2009) (and cases cited).

> The prosecution in a criminal case shall provide written notice at least 14 days in advance of trial, or orally on the record later if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. [MRE 404(b)(2).]

Therefore, in most cases, a trial court's decision whether to admit other-acts evidence should be "far removed from the heat of trial," to use the dissent's phrasing. *Post* at 70. In this case, even though the prosecutor did not provide the required notice in advance of trial (or explain why pretrial notice should be excused), the trial judge had ample opportunity to consider the question of admissibility of the evidence when the topic came up, and defense counsel objected to its admission, both outside the presence of the jury before its admission and subsequently when defendant moved for a mistrial.

[9] Although this Court in *Taylor* cited MRE 404(b) in passing, it did not rely on that rule in concluding that evidence of prior convictions is admissible to rebut specific testimony of the defendant at trial. We believe that *Taylor* reached the correct result, but we take this opportunity to clarify that the admissibility of defendant's prior convictions to impeach by contradiction a witness' testimony is governed by MRE 404(b).

In this case, the prosecutor's initial questions were not logically relevant[10] to a proper purpose under MRE 404(b) because they were not designed to elicit an answer contradicting any statements made by the witness on direct examination. See *People v Denson*, 500 Mich 385, 402; 902 NW2d 306 (2017).[11] As it pertained to weapons, the witness's direct testimony was limited to whether defendant owned a gun or possessed one on the date in question. This testimony would not have been contradicted even if the witness had acknowledged "know[ing] of" defendant to more generally carry weapons.[12] Thus, although the prosecu-

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[10] See MRE 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

[11] In *Denson*, 500 Mich at 401, we said that logical relevance has two components: materiality and probative value. Other-acts evidence offered to impeach specific testimony satisfies the materiality component of logical relevance because witness credibility is "of consequence" to the action. MRE 401. However, the other-acts evidence must still be probative to the purpose for which it was offered. *Denson*, 500 Mich at 402 (stating that "the proffered evidence truly must be probative of something other than the defendant's propensity to commit the crime") (quotation marks, citation, and emphasis omitted). For the reasons discussed above, the testimony elicited was not probative with regard to impeachment.

[12] The dissent argues that we have failed to show that the prosecutor's initial questions were improper under MRE 611 because the questions were within the scope of cross-examination. That is a straw man. We have nowhere stated that the questions were improper under MRE 611 or not within the scope of cross-examination. As explained further below, however, the questions concerned other acts and were not offered for a proper purpose under MRE 404(b). A question may be within the scope of cross-examination under MRE 611 and still run afoul of another evidentiary rule, such as MRE 404(b). See MRE 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court."); *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644; 136 L Ed 2d 574 (1997)

tor articulated a proper purpose under MRE 404(b)—impeachment by contradiction—the prosecutor did not establish that the questions asked were logically relevant to impeachment.[13] The prosecutor's broad and repeated questions about defendant's weapons-carrying proclivities were simply an attempt to elicit propensity evidence.[14]

Absent a proper purpose, evidence of defendant's other acts was inadmissible under MRE 404(a) unless defendant opened the door by introducing evidence of his good character. See MRE 404(a)(1) (prohibiting the prosecution from offering character evidence of an accused to prove action in conformity therewith on a particular occasion, except on rebuttal if the accused has first offered evidence of his or her good character). Defendant in this case, however, never opened the door by eliciting testimony as to his good character from the

(" 'Although . . . "propensity evidence" is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.' "), quoting *United States v Moccia*, 681 F2d 61, 63 (CA 1, 1982). The dissent recognizes this principle elsewhere, see *post* at 82 n 23, but ignores it here.

[13] See *Denson*, 500 Mich at 400 ("In other words, merely *reciting* a proper purpose does not actually demonstrate the *existence* of a proper purpose for the particular other-acts evidence at issue and does not automatically render the evidence admissible. Rather, in order to determine whether an articulated purpose is, in fact, merely a front for the improper admission of other-acts evidence, the trial court must closely scrutinize the logical relevance of the evidence under the second prong of the *VanderVliet* test."); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).

[14] Although we need not reach the issue, we also question whether the prosecutor's use of defendant's prior convictions to impeach a separate witness could pass muster under Rule 403, which provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." See *VanderVliet*, 444 Mich at 74-75 (identifying the MRE 403 balancing test as one of the four prongs of the test for admissibility under MRE 404(b)).

defense witness on direct examination. The prosecutor's tactic—i.e., shifting the focus from the pertinent facts to which the witness testified on direct examination to a broader inquiry about defendant's general weapons proclivities—was an impermissible attempt by the prosecutor to open the subject of defendant's character.[15] Where, as here, the defendant does not offer character evidence, a prosecutor's attempt to

[15] Questions designed to elicit character evidence are generally inappropriate even when asked of the defendant on cross-examination. As a leading treatise notes:

> When the defendant is asked on cross-examination about his criminal tendencies, forcing him to object to the initial question would once again raise a red flag (he must be a crook, if he cannot give a straight answer to such a question), and if the question gets by without objection or he answers quickly, the prosecutor should not be allowed to contradict whatever he says ("no, I'm not involved in crime") by proving prior crimes. [3 Mueller & Kirkpatrick, Federal Evidence (4th ed), § 6:90, p 570.]

That is why, unlike the dissent, see *post* at 79 n 18, we would not penalize defendant for his counsel's failure to object to the initial improper question.

The questions are even more indefensible (and unusual) in this case, since the prosecutor attempted to open the subject of defendant's character on cross-examination of a witness other than defendant. Like courts from other jurisdictions, we firmly reject this tactic. See *Smith v State*, 763 SW2d 836, 843 (Tex App, 1988) ("Further, the State may not, on cross-examination, transform appellant's fact witness into a character witness in order to impeach with otherwise admissible 'have you heard' questions."); *People v Jones*, 278 App Div 2d 246, 247; 717 NYS2d 270 (2000) ("The Supreme Court erred in permitting the prosecutor to cross-examine the fiancée about the defendant's previous convictions. Although such cross-examination may be permissible if the defendant 'opens the door' by offering evidence which tends to mislead the jury, in this case, the Supreme Court's ruling permitted the People to 'open the door' and then step through it[.]") (quotation marks and citation omitted); see also *State v Gowan*, 302 Mont 127, 131; 2000 MT 277; 13 P3d 376 (2000) ("We conclude that although a defendant can open the door with statements made during either direct or cross-examination, and a defense witness can open the door on direct-examination, a defense witness cannot inadvertently open the door on cross-

elicit character evidence regarding the defendant on cross-examination of another witness is not permitted by MRE 404(a)(1).[16]

Despite the analysis above, the prosecutor maintains that her second set of questions regarding defendant's prior firearm convictions was appropriate to impeach the witness's response to the first set of improper questions. However, it should almost go without saying that a party cannot seek to elicit inadmissible character evidence on cross-examination when the opposing party has not opened the door and then claim the right to impeach the elicited denial as a subterfuge to elicit even more inadmissible character evidence. See generally *People v Stanaway*, 446 Mich 643, 693; 521 NW2d 557 (1994) ("[A] prosecutor may not use an elicited denial as a springboard for introducing [otherwise inadmissible] substantive evidence under the guise of rebutting the denial.") (citation omitted). See also *Jones v Southern Pac R*, 962 F2d

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examination. Under [Montana Rule of Evidence 404(a)(1)], only the accused can 'open the door' for the prosecution to introduce rebuttal character evidence.").

[16] The dissent argues there can be no violation of MRE 404 since the prosecutor's initial questions failed to elicit other-acts evidence from the witness. The dissent's assertion misses the marks for two reasons. First, it is beyond dispute—or should be—that questions designed to elicit other-acts evidence, absent a proper purpose, violate MRE 404(b) and are objectionable for that reason. See 1 McCormick, Evidence (7th ed), § 190, p 1030 n 5 ("The [404(b)] rule of exclusion encompasses questions which, though answered negatively, insinuate that the accused committed other crimes."). That is why attorneys typically object before the witness provides an answer to the question. 3 Michigan Pleading & Practice (2d ed), § 35:36, p 593 ("An objection to a question should be made before the answer."). Second, the dissent's argument is blithely indifferent to the most problematic aspect of this case—that the prosecutor was allowed to use an improper question to elicit a denial that the prosecutor then was allowed to impeach with defendant's prior criminal history.

447, 450 (CA 5, 1992) ("[A] party cannot delve into collateral matters on its own initiative and then claim a right to impeach that testimony with contradictory evidence. This would be a mere subterfuge to get before the jury evidence not otherwise admissible.") (quotation marks and citations omitted).[17] Any other conclusion would eviscerate Rule 404.[18]

IV. CONCLUSION

For the above reasons, we reverse that part of the Court of Appeals' judgment holding that the cross-examination of defense witness Tameachi Wilder con-

[17] It is rather facile to think, as the dissent apparently does, that the prosecutor questioned the witness on defendant's prior gun convictions in order to spread doubt among the jury members about whether she really had knowledge of defendant generally. While the prosecutor may have intended to impeach the witness's specific testimony regarding defendant's wardrobe preferences and dominant hand, it is hard to see how the prosecutor would make much headway showing the witness did not have "knowledge of defendant generally," given that they were married for nine years and the witness had "been with him for sixteen years."

[18] If we looked approvingly on the prosecutor's stratagem in this case, one might expect prosecutors to ask improper propensity questions in every case if nothing more were needed to lay the groundwork for the admission of otherwise inadmissible other-acts evidence. Indeed, under the dissent's analysis, a prosecutor would have a foolproof way of admitting a defendant's prior crimes. Simply ask, "Do you know of defendant to engage in [insert criminal activity]." If the witness answers no, then no violation has occurred, and the prosecutor can then impeach the denial with defendant's criminal record. Taken a step further, a prosecutor could ask a defendant, "Do you commit crimes?" If no, then the prosecutor may impeach with the defendant's entire criminal history. Viewed in this light, the prosecutor's tactic is not merely a "novelty," *post* 70, but an end run around a safeguard "deeply rooted in our jurisprudence," *People v Crawford*, 458 Mich 376, 383-384; 582 NW2d 785 (1998) ("Far from being a mere technicality, the rule reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence.") (quotation marks and citations omitted).

cerning whether she knew of defendant to carry guns and her knowledge of the defendant's prior weapons convictions was not error, and we remand this case to the Court of Appeals to consider whether the error was harmless.[19]

MCCORMACK, BERNSTEIN, and CLEMENT, JJ., concurred with VIVIANO, J.

ZAHRA, J. (*dissenting*). The Court concludes that the prosecutor's use of defendant's convictions for possessing a firearm during the commission of a felony (felony-firearm) to impeach a defense witness's prior testimony on cross-examination was improper under Michigan Rule of Evidence 404(b). As more fully explained below, I disagree with the majority's interpretation and application of Rule 404(b).[1] While the manner in which defendant's prior convictions were used in this case was undoubtedly atypical, novelty alone is no reason to misconstrue the plain language of the rules of evidence. In my view, the Court, with the benefit of hindsight and far removed from the heat of trial, has unduly restricted the discretion of the trial judge with regard to the admission of evidence. Accordingly, I dissent.

I. FACTS AND PROCEEDINGS

Defendant Darrell J. Wilder was charged with carrying a concealed weapon, being a felon in possession of a firearm (felon-in-possession), and felony-firearm

[19] In all other respects, leave to appeal is denied because we are not persuaded that the remaining question presented should be reviewed by the Court.

[1] I agree with the majority that neither Rule 608 nor Rule 609 is applicable in this case.

after two Detroit police officers saw defendant pull a hand-held firearm with his right hand from his right pants pocket and place it in the trunk of a vehicle located in a vacant lot. One of the officers testified that defendant was wearing "corduroy or pants similar" to corduroy on the night in question.

During trial, defendant called several witnesses, one of whom was his wife, Tameachi Wilder. This witness testified that she and defendant had been married for nine years and, although there were occasions during their marriage when they had been separated, the two of them were living together on May 16, 2014, the date of the offense. She also testified that, to her knowledge, defendant did not wear or even own corduroys, and that he is left-handed. When asked how she knew that defendant was left-handed, she responded, "[b]ecause I've been with him for sixteen years."

According to the witness, she was with defendant on the afternoon in question when he received a call from his brother, Carlos Wilder. The witness testified that defendant left with Carlos and that she did not know where they were going. The following exchange then took place between defense counsel and the witness on direct examination:

> *Q*. Okay. And when you see your husband leave the house did you see him with a gun?
>
> *A*. No.
>
> *Q*. To your knowledge, do [sic] he own a gun?
>
> *A*. No.
>
> *Q*. Do you have any weapons in your house?
>
> *A*. No.

During cross-examination, the prosecutor asked the witness the following questions:

Q. Now you were asked whether or not Mr. Wilder had a weapon with him on that day?

A. Yes.

Q. Okay. You don't know where he went? You didn't see where he went after he left your apartment on the eastside of Detroit, did you?

A. No.

Q. Do you know of Mr. Wilder to carry weapons?

A. No.

Q. Do you know of him to carry guns?

A. No.

Q. You've been with him for nine years and you don't know of him to carry guns?

A. No.

At this point, the prosecutor asked to approach the bench and the jury was excused. Outside the presence of the jury, the following discussion occurred:

[*The Prosecutor*]: Your Honor, Mrs. Wilder testified that she's known him for sixteen years and has been married to him for nine years and now is testifying that she did not know him to carry a weapon. He has a Felony[-]Firearm conviction on August of 2010, another Felony-Firearm conviction on June of 2007, and I think that it is relevant and I think that I should be able to ask her about those convictions.

[*Defense Counsel*]: Your Honor, the Prosecutor is simply trying to back-door and get in convictions that she knows that she can't get in, and the fact that Mr. Wilder had been convicted, these aren't crimes involving theft, dishonesty or false statements, and then it presumes that Ms. Wilder knows something. Again, she says they've had an on and off again relationship. I don't think it's relevant and it's simply a way of them trying to back-door and get in convictions that they know aren't relevant.

> [*The Court*]: Well I'm going to allow and that's what happens when you put witnesses on the stand and open the door. I mean she got on the stand, and you asked her on direct examination if she's ever seen with a gun [sic], if there were any guns in the house, if he owned any weapons and if he had a gun that day, so that doesn't mean that once on cross-examination, and you talked about the length of their relationship. That doesn't mean that on cross-examination that she can't challenge that, challenge the voracity [sic] of him. In essence she becomes like a character witness and so I believe you've opened the door and I'm going to allow it. Your objection is overruled. Your objection is preserved for the record.

During further cross-examination, the prosecutor then asked the following questions:

> *Q*. Ms. Wilder, you were with him in 2007, correct?
>
> *A*. Yes.
>
> *Q*. And you know that he was convicted of carrying a weapon back then, correct?
>
> *A*. Yes.
>
> *Q*. So you knew that he carried weapons, right?
>
> *A*. No. I didn't know but he was convicted.
>
> *Q*. Okay. You didn't know that he—you didn't see a weapon in your house?
>
> *A*. No.
>
> *Q*. Do you know the circumstances behind that?
>
> *A*. No.

Regarding defendant's second felony-firearm conviction, the prosecutor asked the following questions:

> *Q*. And you know that he was convicted of having a weapon back in August of 2010 too, right?
>
> *A*. Yes.
>
> *Q*. Was that gun in your home?
>
> *A*. No.

Outside the presence of the jury, defense counsel moved for a mistrial on grounds that the prosecutor's questioning of the witness was "inadmissible" and "unfairly prejudicial." Defense counsel argued that she had not opened the door for character evidence because her questions of the witness concerned whether defendant possessed a firearm on the day of the incident and that it had been the prosecutor who questioned the witness about whether she knew defendant to possess a firearm. The trial court denied the motion. The jury subsequently returned a verdict of guilty for the felon-in-possession and felony-firearm charges, but acquitted defendant of carrying a concealed weapon.

Defendant appealed by right, arguing, *inter alia*, that the trial court erred by allowing cross-examination of the witness about defendant's prior felony-firearm convictions and denying the subsequent motion for a mistrial. The Court of Appeals disagreed, concluding that the trial court had not abused its discretion by denying defendant's motion for a mistrial because the trial court had not erred by admitting evidence of defendant's prior convictions.[2] In reaching this conclusion, the Court of Appeals held that the impeachment evidence was admissible under Rule 404(b) because the prosecutor sought to introduce the prior convictions to challenge the credibility of the witness relative to the assertion that defendant did not own or carry firearms.

Defendant applied for leave to appeal in this Court. This Court directed the Clerk to schedule oral argument on whether to grant the application or take other action.[3]

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[2] *People v Wilder*, unpublished per curiam opinion of the Court of Appeals, issued September 27, 2016 (Docket No. 327491).

[3] *People v Wilder*, 500 Mich 997 (2017).

II. STANDARD OF REVIEW

The decision to admit evidence is within the trial court's discretion and will not be disturbed unless that decision fell " 'outside the range of principled outcomes.' "[4] We review de novo preliminary questions of law, however, which include whether a rule of evidence prohibits the admission of particular evidence, and a trial court abuses its discretion if it admits evidence that is inadmissible as a matter of law.[5]

III. ANALYSIS

It is important to keep in mind the two discrete sets of questions at issue in this case, as well as the testimonial evidence those questions elicited. The first set of questions concerned whether the witness knew defendant "to carry weapons . . . [or] guns" and the witness's responses of "no." The second set of questions concerned whether the witness had knowledge of defendant's prior felony-firearm convictions, to which the witness responded in the affirmative. The admissibility of the witness's testimony (which is evidence) and the questions that elicited it (which are not evidence) will be addressed in turn.

A. TESTIMONY THAT THE WITNESS DID NOT KNOW DEFENDANT TO CARRY FIREARMS IS NOT "OTHER ACTS" EVIDENCE UNDER RULE 404(b)

To begin, the majority posits that the prosecutor's initial questions relating to whether the witness knew defendant to carry "weapons" or "guns" were improper

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[4] *People v Douglas*, 496 Mich 557, 565; 852 NW2d 587 (2014), quoting *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013).

[5] *People v Bynum*, 496 Mich 610, 623; 852 NW2d 570 (2014), citing *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

under Rule 404(b) because the witness only testified on direct examination as to whether defendant owned or possessed a firearm on May 16, 2014, and because the questions were not logically relevant to a proper purpose under that rule. I disagree with the majority on both accounts.

First, restricting a party's cross-examination of a witness to the precise temporal confinements of direct examination would, in the words of the majority, violate a "basic tenet[] of our rules of evidence"[6] that, under Rule 611, a "witness may be cross-examined on *any matter relevant to any issue in the case* . . . ."[7] When it comes to "matters not testified to on direct examination," it falls within the trial court's discretion to permit or limit cross-examination,[8] and a trial court's

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[6] *Ante* at 60.

[7] MRE 611(c) (emphasis added); see also *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001) (stating that a trial court has discretion in determining relevance and considering the possibility of unfair prejudice when ruling on the propriety of questions asked on cross-examination). Notably, evidence that falls under 404(b), even if inadmissible, is often "relevant" to an issue in a case. See *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644; 136 L Ed 2d 574 (1997) ("The inquiry [into one's character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.") (quotation marks and citation omitted). Therefore, nothing in Rule 611 prohibits a prosecutor from cross-examining a witness regarding 404(b) evidence.

[8] MRE 611(c); see also *Wischmeyer v Schanz*, 449 Mich 469, 474-475; 536 NW2d 760 (1995) ("The scope and duration of cross-examination is in the trial court's sound discretion; we will not reverse absent a clear showing of abuse."), citing *Wilson v Stilwill*, 411 Mich 587, 599; 309 NW2d 898 (1981); *People v Watson*, 307 Mich 596, 607-608; 12 NW2d 476 (1943) ("[C]ross-examination on matters relevant to the issue is a matter of right and . . . the extent of it is a matter that rests in the sound discretion of the trial judge."); accord *Heshelman v Lombardi*, 183 Mich App 72, 84; 454 NW2d 603 (1990) ("The scope of cross-examination, like

decision on a close evidentiary question will ordinarily not be an abuse of discretion.[9]

In this case, the witness's testimony on direct examination touched upon her knowledge of defendant owning or possessing a firearm earlier in the day on May 16, 2014.[10] It also touched upon her knowledge of defendant as it related to his dominant hand and his ownership of corduroy pants. The prosecutor's cross-examination expanded the temporal scope of the former issue by addressing the witness's knowledge of defendant's ownership or possession of a firearm beyond the date of the offense. Permitting this line of questioning was certainly within the range of principled outcomes and not an abuse of discretion on the part of the trial court. The majority, however, provides no explanation for why there is a clear showing that the trial court abused its discretion by permitting these questions under Rule 611 or this Court's jurisprudence. More importantly, neither does defendant.

Second, the majority claims that these "initial questions were not logically relevant to a proper purpose under MRE 404(b) because they were not designed to elicit an answer contradicting any statements made by

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the admission of evidence, is a matter within the trial court's discretion, and the court's determination should not be reversed absent an abuse of that discretion.").

[9] *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000); see also *Layher*, 464 Mich at 761, citing *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982).

[10] Because the witness did not accompany defendant when he left the apartment, she had no actual knowledge as to whether defendant was in possession of a firearm while he was in the vacant lot. Accordingly, the relevancy of her testimony that she did not observe defendant in possession of a firearm while he was present in the apartment was presumably to show that it was more probable than not that he did not possess the firearm later in the day.

the witness on direct examination."[11] The majority, however, fails to explain why this line of questioning, and the "no" responses it produced, implicates Rule 404(b) in the first place.

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[12] Even assuming that the prosecutor's questions "elicit[ed] propensity evidence" regarding defendant's "weapons-carrying proclivities,"[13] as the majority suggests, it is axiomatic that these questions, by themselves, were not evidence.[14] Rather, it is the sworn testimony of the witness in response to those questions that constituted evidence; the prosecutor's questioning could be used only to give meaning to the witness's responses.[15]

In this case, the testimonial evidence adduced during cross-examination was that the witness did not know defendant to carry firearms. But by answering in

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[11] *Ante* at 65 (citation omitted).

[12] MRE 404(b)(1).

[13] *Ante* at 66.

[14] *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009); see also M Crim JI 3.5(2) ("Evidence includes only the sworn testimony of witnesses[, the exhibits admitted into evidence, and anything else I told you to consider as evidence]."); M Crim JI 2.7 ("The questions the lawyers ask the witnesses are not evidence. Only the answers are evidence. You should not think that something is true just because one of the lawyers asks questions that assume or suggest that it is."); M Crim JI 3.5(5) ("The lawyers' statements and arguments [and any commentary] are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge. The lawyers' questions to the witnesses[, your questions to the witnesses,] and my questions to the witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers.").

[15] *Mesik*, 285 Mich App at 541.

the negative, how exactly does the witness's testimony of defendant not performing an act amount to evidence of defendant's "other acts" to implicate Rule 404(b)? The majority provides no answer to this question.[16] That is because, in my opinion, there is none.[17] It goes without saying that without evidence of defendant's other crimes, wrongs, or acts, Rule 404(b) cannot be applied for purposes of determining admissibility.[18]

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[16] The majority similarly states later in its opinion that "a prosecutor's attempt to elicit character evidence regarding the defendant on cross-examination of another witness is not permitted by MRE 404(a)(1)." *Ante* at 67-68. Rule 404(a)(1) provides:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . [e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2), evidence of a trait of character for aggression of the accused offered by the prosecution[.]

Again, the majority is mistaking questions with testimony when it comes to inadmissible evidence under Rule 404(a)(1).

[17] See, e.g., *Mesik*, 285 Mich App at 540-541 ("Had defendant confirmed, as a witness from the stand, any of the assertions by the prosecutor, those confirmations would have constituted evidence. But defendant only denied any recollection of the matters about which he was asked. Although the prosecutor's questions were, as noted, misleading and improper, the prosecutor's questions are not evidence and therefore cannot be hearsay.").

[18] The majority is correct that a question designed to elicit inadmissible evidence is objectionable. Thus, at most, the majority has provided an ample explanation for why defense counsel would have been justified in objecting to the prosecutor's initial questions. Counsel, however, did not object to these questions, and the witness did not testify about defendant's other acts. On the other hand, had the witness responded that she did know defendant to carry firearms, perhaps then the majority would be correct that such testimony was inadmissible under Rule 404(b). But that is not the case here.

Accordingly, the trial court did not abuse its discretion by admitting this evidence because that decision fell within the range of principled outcomes and the witness's testimony was not inadmissible as a matter of law.

B. DEFENDANT'S PRIOR CONVICTIONS WERE ADMISSIBLE FOR THE NONCHARACTER PURPOSE OF IMPEACHMENT UNDER RULE 404(b)

After responding that she did not know defendant to carry firearms, the prosecutor sought to impeach this testimony by asking the witness whether she knew of defendant's prior felony-firearm convictions from 2007 and 2010. The theory underlying this line of questioning was that if the witness knew of defendant's prior convictions for carrying a firearm, then she knew that defendant had previously carried firearms, which would be inconsistent with her prior testimony that she did not know defendant to carry firearms. Moreover, these questions sought to undermine the witness's credibility and knowledge of defendant generally, which she relied upon when testifying that defendant was left-handed and did not own or wear corduroy pants. So it goes, the witness responded to the prosecutor's questions in the affirmative.[19]

Although this testimonial evidence regarding defendant's prior convictions would be inadmissible "to prove the character of [defendant] in order to show action in conformity therewith," Rule 404(b) provides

[19] The distinction the witness drew in her testimony between knowing of defendant's prior felony-firearm convictions but not knowing that he, in fact, carried a firearm, while epistemologically interesting, does not negate the fact that the prosecutor had a good-faith purpose under Rule 404(b)(1) to seek to introduce testimonial evidence of defendant's prior convictions to impeach the witness and challenge her credibility.

that such evidence may be admitted for a purpose other than to show defendant's propensity to commit the crimes charged.[20] In this case, defendant's prior convictions were offered for a noncharacter purpose—impeachment.[21]

By seeking to introduce evidence of defendant's prior convictions in this case, the prosecutor was not attempting to solely establish either that defendant had a propensity for committing firearms-related crimes or that the prior convictions made it more likely that defendant committed the crimes for which he was on trial. Instead, this evidence was used to impeach the witness's prior testimony that she did not know defendant to carry firearms. For this reason alone, defendant's prior convictions were admissible under Rule 404(b).

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[20] MRE 404(b)(1) ("Evidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."). Because this rule favors the inclusion of evidence over its omission, we often refer to it as an inclusionary rule. See, e.g., *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993) (" 'Put simply, [Rule 404(b)] is *inclusionary* rather than exclusionary.' "), quoting *People v Engelman*, 434 Mich 204, 213; 453 NW2d 656 (1990). Accordingly, "[e]vidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity." *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010). In other words, evidence susceptible to a prohibited propensity inference can still be admitted despite the rule, if it serves a valid purpose. *Rock v Crocker*, 499 Mich 247, 257; 884 NW2d 227 (2016); *Mardlin*, 487 Mich at 616.

[21] Although impeachment is not expressly listed as one of the examples in Rule 404(b)(1), this Court has repeatedly held that this list is nonexhaustive in nature. See *People v Jackson*, 498 Mich 246, 259; 869 NW2d 253 (2015).

Again, this use of defendant's prior convictions may have been unusual, but it was still permissible under Rule 404(b). Although the majority looks disapprovingly upon the prosecutor's tactic and believes this conclusion would somehow "eviscerate Rule 404,"[22] it is the correct outcome given the plain language of that rule.[23]

C. THE PROSECUTOR'S QUESTIONS SERVED A VALID NONPROPENSITY PURPOSE WHEN CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES

A broader and more general point bears discussion as well. Impeachment need not be as obvious as using a single question to point out an inconsistency. It can be as subtle as showing that evidence, apparently credible, is actually anything but when all the facts are laid before the jury.[24] The prosecutor's questions, regardless of whether they were or were not evidence, were clearly designed to impeach the witness's credibility and veracity, particularly when they are viewed in the context of the witness's entire testimony.

Throughout direct examination, defense counsel elicited more from the witness than simply whether

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[22] *Ante* at 69.

[23] This is not to say that defendant's prior convictions could not have been found to be inadmissible under another rule of evidence. For instance, Rule 403 provides that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. But defendant failed to provide any meaningful analysis in either his application for leave to appeal in this Court or his supplemental brief to explain why the impeachment evidence in this case is unfairly prejudicial *and* how that prejudice substantially outweighs the probative value.

[24] See generally *Behler v Hanlon*, 199 FRD 553, 556 (D Md, 2001) (observing the multitude of ways to impeach a witness and that the rules of evidence were not designed to narrow the range of permissible methods).

defendant left the house with a gun on the day in question; counsel also implied that this witness was a credible source of this information by tacitly suggesting that the jury could trust this witness with regard to what defendant did or did not have in his possession:

Q. . . . Ms. Wilder, do you know somebody named Darrell Wilder?

A. Yes.

Q. And how do you know him?

A. He's my husband.

Q. And how long have you been married?

A. We've been married nine years. . . .

Q. And back on May 16, 2014 [the date in question], what was the status of your relationship with Mr. Wilder?

A. Married still.

Q. Okay. And were you living together on that day?

A. Yes.

Q. And on that day was Mr. Wilder at the house with you?

A. Yes.

* * *

Q. Okay. And when you see your husband leave the house did you see him with a gun?

A. No.

Q. To your knowledge, do[es] he own a gun?

A. No.

Q. Do you have any weapons in your house?

A. No . . .

Q. And Mr.—your husband, do you know whether he's left-handed or right handed . . .

A. He's left.

Q. How do you know?

A. Because I've been with him for sixteen years.

There was nothing wrong with defense counsel's approach; it is elemental to present the witness in a favorable light to make her testimony appear more truthful than not. Counsel's approach, however, was built on an incomplete presentation of the facts. The prosecutor knew this, which is why, on cross-examination, she understandably sought to rebut the inference:

Q. All right. You've been married to him for nine years; is that correct?

A. Yes.

Q. Would you agree with me that you have an off and on type relationship, right?

A. Yes.

Q. In fact, he has other children by other women, correct?

[*Defense counsel*]. Relevance, you[r] Honor? Objection, relevance.

[*The Court*]. How is that relevant?

[*Prosecutor*]. Well, Judge, it's my position that he doesn't always stay with her that at the apartment that she testified that she lives in so she doesn't know what he may be doing or what type of weapon he may possess.

[*The Court*]. Overruled.

* * *

Q. And how long before May—had Mr. Wilder been living with you for a period of time before May 16th?

A. Yes. Like it's been off and on because we were trying to work on our marriage.

Q. Okay. When you say off and on, how long had he been living at your apartment on the eastside of Detroit?

A. For about a month.

Q. And you'd agree with me that he didn't have all his things at your home, correct?

A. No. He had most of them, yeah. He had most of them.

* * *

Q. Now you were asked whether or not Mr. Wilder had a weapon with him on that day?

A. Yes.

Q. Okay. You don't know where he went? You didn't see where he went after he left your apartment on the eastside of Detroit, did you?

A. No.

Q. Do you know of Mr. Wilder to carry weapons?

A. No.

Q. Do you know of him to carry guns?

A. No.

Q. You've been with him for nine years and you don't know of him to carry guns?

A. No.

Evident from this line of questioning was the prosecutor's tactic of trying to rebut an inference that the witness was a credible source of information about defendant and, therefore, it served the valid purpose of impeaching the witness's credibility in general. Because this case turned on the issue of whether defendant carried or possessed the hand-held firearm before placing it in the trunk of the car, the purported relevance of the witness's testimony that she did not observe defendant leave the house with a firearm was that it made this crucial fact at

trial less likely. Because defense counsel's questioning inferentially portrayed the witness as a credible source of this information, it is reasonable to conclude that the jury would have been more likely to believe the witness.

But if defendant kept other houses and their marriage was often on the rocks, then perhaps the witness did not know as much as she suggested by her testimony on direct examination. Moreover, if the witness knew that defendant typically carried firearms, the witness's blanket denial that defendant even possessed a firearm, coupled with these other omitted facts, would appear to be disingenuous, perhaps even dishonest. This is precisely what the prosecutor's questions were attempting to demonstrate: that, through the witness's testimony, defense counsel was portraying half-truths as the complete factual circumstances.[25]

This calculus does not change merely because the prosecutor was attempting to impeach an inference rather than direct testimony. Indirect inferences can be as probative and reliable as direct evidence.[26] Parties are even free to build inferences upon inferences for the jury to consider, if they are logically relevant.[27] Accordingly, where testimony is given by a witness on direct examination from which an inference arises favorable to the producing party, surely anything within the knowledge of the witness tending to rebut

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[25] Contra *ante* at 65 (suggesting that the prosecutor's questions were only logically relevant if they were designed to elicit an answer directly contradicting statements made by the witness during direct examination).

[26] See *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986).

[27] *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); see also *VanderVliet*, 444 Mich at 61 (noting disagreement with the idea that an inference could not be based on another inference).

that inference is admissible. This is the very essence of impeachment.[28]

Because the prosecutor's questions served a valid nonpropensity purpose, Rule 404(b) did not bar the witness's testimony concerning defendant's prior convictions. And because the witness continued to deny knowing whether defendant ever carried firearms, the prosecutor was entitled to ask the trial court whether she could impeach the witness with questions about defendant's prior convictions. That is not to say that the prosecutor's initial questions did not carry with them a risk that the jury would consider the witness's answers as proof of defendant's alleged criminal tendencies. That risk was very real. But Rule 404(b) does not apply simply because evidence carries a risk of propensity reasoning. Rather, it only applies when evidence is offered that has *no other* valid purpose.[29]

IV. CONCLUSION

For these reasons, I believe the Court of Appeals correctly concluded that the defense witness's testimonial evidence concerning her knowledge of defendant's

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[28] Nor is there anything revolutionary about this statement. See *Campau v Dewey*, 9 Mich 381, 414 (1861) ("By this course of inquiry, the plaintiffs had made the identity of all the reservees a question in some degree pertinent to the case, if indeed it were not so before; and opened this whole field of inquiry to cross-examination by the defendants; for, if the plaintiffs could inquire into the names and family connections of the various reservees, for the purpose of strengthening the inference of identity, and to gain a higher degree of credit for their witness, by showing extensive familiarity with, and a clear memory of the facts, the defendants must be allowed to cross-examine him at large upon the same general subjects, for the purpose of weakening the inference from his direct evidence, and to diminish the credit otherwise due to his testimony, by exposing the imperfection of his knowledge and the confusion of his memory.").

[29] *Rock*, 499 Mich at 257; *Mardlin*, 487 Mich at 616.

prior weapons convictions was admissible under Rule 404(b). Because there is no need to remand this case to the Court of Appeals to conduct a harmless-error analysis, I respectfully dissent.

MARKMAN, C.J., and WILDER, J., concurred with ZAHRA, J.

PEOPLE v SKINNER

PEOPLE v HYATT

Docket Nos. 152448, 153081, and 153345. Argued October 12, 2017 (Docket No. 152448 as Calendar No. 1; Docket Nos. 153081 and 153345 on application for leave to appeal). Decided June 20, 2018.

Following a jury trial in the St. Clair Circuit Court, Tia Marie-Mitchell Skinner was convicted of first-degree premeditated murder, conspiracy to commit murder, and attempted murder for acts committed when she was 17 years old. The court, Daniel J. Kelly, J., sentenced Skinner to life in prison without the possibility of parole. The Court of Appeals, SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ., in an unpublished per curiam opinion issued February 21, 2013 (Docket No. 306903), remanded for resentencing under *Miller v Alabama*, 567 US 460 (2012), which held that mandatory life-without-parole sentences for offenders under 18 years old violate the Eighth Amendment. The Supreme Court denied leave to appeal. 494 Mich 872 (2013). On remand, the trial court reimposed a life-without-parole sentence. After Skinner was resentenced, MCL 769.25 took effect, setting forth a new framework for sentencing juveniles convicted of first-degree murder. The Court of Appeals remanded for resentencing under MCL 769.25 in an unpublished order entered July 30, 2014 (Docket No. 317892). On remand, the trial court again sentenced Skinner to life without parole. In a split, published decision, the Court of Appeals, HOEKSTRA, P.J., and SAWYER and BORRELLO, JJ., again remanded for resentencing, holding that a jury must decide whether Skinner should be sentenced to life without parole and that, to the extent that MCL 769.25 requires the trial court to make this determination, MCL 769.25 is unconstitutional. 312 Mich App 15 (2015). The Supreme Court granted the prosecutor's application for leave to appeal, directing the parties to address whether the decision to sentence a person under the age of 18 to a prison term of life without parole under MCL 769.25 must be made by a jury beyond a reasonable doubt. 500 Mich 929 (2017).

Following a jury trial in the Genesee Circuit Court, Kenya A. Hyatt was convicted of first-degree felony murder, armed robbery, conspiracy to commit armed robbery, and possessing a firearm

during the commission of a felony for acts committed when he was 17 years old. The court, Judith A. Fullerton, J., after an evidentiary hearing at which she considered the *Miller* factors, sentenced Hyatt to life in prison without the possibility of parole. In a published opinion, the Court of Appeals, TALBOT, C.J., and CAVANAGH and K. F. KELLY, JJ., affirmed Hyatt's convictions and would have affirmed his sentence but for *Skinner*, which held that a jury must decide whether to impose a life-without-parole sentence on a juvenile. 314 Mich App 140 (2016). The Court of Appeals declared a conflict pursuant to MCR 7.215(J), and in a published decision, the conflict panel, SHAPIRO, P.J., and MARKEY, METER, BECKERING, STEPHENS, M. J. KELLY, and RIORDAN, JJ., unanimously disagreed with *Skinner* and held that a judge may decide whether to impose a nonparolable life sentence on a juvenile. 316 Mich App 368 (2016). However, the Court of Appeals reversed Hyatt's life-without-parole sentence and remanded the case to the trial court for resentencing at which "the trial court must not only consider the *Miller* factors, but decide whether defendant Hyatt is the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform." The Supreme Court ordered and heard oral argument on whether to grant the prosecution's application for leave to appeal or take other peremptory action, instructing the parties to address whether the conflict-resolution panel of the Court of Appeals erred by applying a heightened standard of review for sentences imposed under MCL 769.25. 500 Mich 929 (2017).

In an opinion by Chief Justice MARKMAN, joined by Justices ZAHRA, VIVIANO, and WILDER, the Supreme Court *held*:

MCL 769.25 does not violate the Sixth Amendment because neither that statute nor the Eighth Amendment requires a judge to find any particular fact before imposing a sentence of life without parole; instead, that sentence is authorized by the jury's verdict alone. Accordingly, the Court of Appeals' judgment in *Skinner* was reversed in part, and the holding in *Hyatt* that a judge, not a jury, must determine whether to impose a life-without-parole sentence or a term-of-years sentence under MCL 769.25 was affirmed. However, the Court of Appeals' judgment in *Hyatt* was reversed to the extent that it adopted a heightened standard of review for life-without-parole sentences imposed under MCL 769.25 and remanded the case to the trial court for it to decide whether Hyatt was the "truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform." No such explicit finding was required. Both cases were remanded to the

Court of Appeals to review defendants' sentences under the traditional abuse-of-discretion standard of review.

1. The Sixth Amendment provides that in all criminal prosecutions, the accused has the right to a speedy and public trial by an impartial jury of the state and the district wherein the crime was committed. The Eighth Amendment prohibits the infliction of cruel and unusual punishment. The United States Supreme Court held in *Apprendi v New Jersey*, 530 US 466 (2000), that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt in order to satisfy the Sixth Amendment, and it held in *Miller* that mandatory life-without-parole sentences for juvenile offenders violate the Eighth Amendment. After the decision in *Miller*, the Michigan Legislature enacted MCL 769.25, which set forth a new framework for sentencing juveniles convicted of first-degree murder. Specifically, MCL 769.25(2) provides that a prosecutor may file a motion to sentence a juvenile defendant to life without parole if the juvenile was convicted of a violation of law involving the death of another person for which parole eligibility is expressly denied under state law. If such a motion is filed, MCL 769.25(6) requires the sentencing court to conduct a hearing at which it considers the factors set forth in *Miller*, which take into account the defendant's chronological age and its hallmark features, including immaturity, impetuosity, and failure to appreciate risks and consequences; the defendant's family and home environment; the circumstances of the offense, including the extent of the defendant's participation in the offense and the possible effect of familial and peer pressures; the possibility that the defendant would have been charged with and convicted of a lesser offense but for the incompetencies associated with youth; and the possibility of rehabilitation. Under MCL 769.25(7), the court must specify on the record the aggravating and mitigating circumstances it considered and the reasons supporting the sentence it imposed. If the court decides not to impose a sentence of life without parole, MCL 769.25(9) requires the court to sentence the defendant to imprisonment for a term of years, the minimum term being not less than 25 years or more than 40 years and the maximum term being not less than 60 years.

2. Statutes are presumed to be constitutional, and the Court has a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. Assuming that there are two reasonable ways of interpreting MCL 769.25, one of which renders it unconstitutional and one of which renders it constitu-

tional, the Court has a duty to choose the interpretation that renders it constitutional. The issue was whether MCL 769.25 removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he or she would receive if punished according to the facts reflected in the jury verdict alone in violation of the Sixth Amendment. If the jury's verdict alone does not authorize the sentence but instead the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied. The fact that a term-of-years sentence constituted the default sentence in the absence of a motion by the prosecutor seeking a life-without-parole sentence did not mean that the jury had to find additional facts before a life-without-parole sentence could be imposed. The critical question was whether additional factual findings had to be made, not whether an additional motion had to be filed.

3. MCL 769.25 does not expressly require the court to find any particular fact before imposing life without parole, and such a requirement should not be read into the statute, especially given that doing so would render the statute unconstitutional. MCL 769.25(6) requires that the court conduct a hearing to consider the *Miller* factors, and MCL 769.25(7) requires the court to specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. While the argument that these provisions implicitly require the trial court to find an aggravating circumstance before it imposes a life-without-parole sentence is not unreasonable, it is also not clearly apparent that such a finding is required. MCL 769.25(6) merely requires the trial court to consider the factors listed in *Miller*, and because they are all mitigating factors, the Sixth Amendment does not prohibit trial courts from considering them when choosing an appropriate sentence because doing so does not expose a defendant to a sentence that exceeds the sentence that is authorized by the jury's verdict. MCL 769.25(7) requires the court to specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed, and aggravating circumstances, unlike mitigating circumstances, do have the effect of increasing a defendant's sentence. However, aggravating circumstances do not increase a defendant's sentence beyond that authorized by the jury's verdict, because the trial court does not have to find an aggravating circumstance in order to sentence a juvenile to life without parole. If the trial court finds that there are no mitigating circumstances, there is nothing in the statute that prohibits the trial court from

sentencing a juvenile to life without parole. Given that the statute does not require the trial court to affirmatively find an aggravating circumstance in order to impose a life-without-parole sentence, that sentence is necessarily authorized by the jury's verdict alone. And given that a life-without-parole sentence is authorized by the jury's verdict alone, additional fact-finding by the court is not prohibited by the Sixth Amendment. The United States Supreme Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence. Instead, the Sixth Amendment question is whether the law forbids a judge to increase a defendant's sentence unless the judge finds facts that the jury did not find and that the offender did not concede. Nothing within MCL 769.25 forbids the judge from imposing a life-without-parole sentence unless the judge finds facts that the jury did not find and that the offender did not concede.

4. The Eighth Amendment, under either *Miller* or *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718 (2016), does not require additional fact-finding before a life-without-parole sentence can be imposed. Although there is language in those cases that could be read to suggest that the sentencer must find that the juvenile offender's crime reflects irreparable corruption before a life-without-parole sentence can be imposed, *Miller* simply held that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment and that before such a sentence can be imposed on a juvenile, the sentencer must consider the mitigating qualities of youth, and *Montgomery* expressly stated that *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility. *Montgomery* held that while the substantive rule is that juveniles who are not irreparably corrupt cannot be sentenced to life without parole, the states were free to develop their own procedures to enforce this new substantive rule. In this sense, the "irreparable corruption" standard was analogous to the proportionality standard that applied to all criminal sentences: just as courts are not allowed to impose disproportionate sentences, courts are not allowed to sentence juveniles who are not irreparably corrupt to life without parole. And just as whether a sentence is proportionate is not a factual finding, whether a juvenile is "irreparably corrupt" is not a factual finding. Because the Eighth Amendment does not require the finding of any particular fact before imposing a life-without-parole sentence, the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole.

5. In *Hyatt*, the Court of Appeals erred by holding that the trial court was required to explicitly decide whether defendant was the truly rare juvenile who is irreparably corrupt. *Miller* used the word "uncommon" only once and the word "rare" only once, and when those words are read in context it is clear that *Miller* did not hold that a trial court must explicitly find that a defendant is "rare" or "uncommon" before it can impose life without parole. Although *Montgomery* quoted *Miller*'s references to "uncommon" and "rare," it did not impose any requirement on sentencing courts to determine whether a juvenile offender is rare before sentencing him or her to life without parole. Similarly, neither *Miller* nor *Montgomery* imposed a presumption against life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate court. Those cases simply required that the trial court consider an offender's youth and attendant characteristics before imposing life without parole.

6. Neither *Miller* nor *Montgomery* required Michigan's appellate courts to deviate from their traditional abuse-of-discretion standard in reviewing a trial court's decision to impose life without parole. The Legislature imposed on the trial court the responsibility of making the difficult decision regarding whether to impose a sentence of life without parole or a term of years on the basis of the case-specific detailed factual circumstances. Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a life-without-parole sentence is warranted in a particular case. Accordingly, review de novo, in which a panel of appellate judges could substitute its own judgment for that of the trial court, is not the appropriate standard by which to review the determination that a life-without-parole sentence is warranted; instead, the appellate court must accord this determination some degree of deference.

In *Skinner*, Court of Appeals judgment reversed; case remanded to the Court of Appeals.

In *Hyatt*, Court of Appeals judgment affirmed in part and reversed in part; case remanded to the Court of Appeals.

Justice MCCORMACK, joined by Justice BERNSTEIN, dissenting, would have held that MCL 769.25 is unconstitutional because the most natural reading of that provision requires a trial court to make factual findings beyond those found by the jury before it can impose a sentence of life without parole on a juvenile, which violates the Sixth Amendment under *Apprendi* and its progeny. She would have declined to read the statute not to require these

findings because such a reading would violate the Eighth Amendment under *Miller* and *Montgomery*. Justice MCCORMACK also dissented from the majority's conclusion that traditional abuse-of-discretion review applies to juvenile sentences of life without parole because a determination of whether a sentence is constitutional, like any constitutional question, requires review de novo.

Justice CLEMENT took no part in the decision of this case.

1. CONSTITUTIONAL LAW — JUVENILES — SENTENCES — LIFE WITHOUT PAROLE — FACTUAL FINDINGS.

The Eighth Amendment does not require a court to find any particular fact before imposing a sentence of life in prison without the possibility of parole on a juvenile offender under MCL 769.25; specifically, the court need not find that the juvenile offender was uncommon, rare, or irreparably corrupt before a life-without-parole sentence can be imposed.

2. CONSTITUTIONAL LAW — JUVENILES — SENTENCES — LIFE WITHOUT PAROLE — STANDARD OF REVIEW.

A court's decision to impose a sentence of life in prison without the possibility of parole on a juvenile offender under MCL 769.25 is reviewed for an abuse of discretion.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Senior Assistant Prosecuting Attorney, for the people in Docket No. 152448.

University of Michigan Juvenile Justice Clinic (by *Kimberly A. Thomas* and *Frank E. Vandervort*) for Tia Marie-Mitchell Skinner in Docket No. 152448.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Joseph F. Sawka*, Assistant Prosecuting Attorney, for the people in Docket Nos. 153081 and 153345.

Ronald D. Ambrose for Kenya Ali Hyatt in Docket Nos. 153081 and 153345.

Amici Curiae:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Linus Banghart-Linn*, Assistant Attorney General, for the Attorney General in Docket No. 152448.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *B. Eric Restuccia*, Deputy Solicitor General, for the Genesee County Prosecutor in Docket No. 153081.

Mark Reene, *Kym L. Worthy*, *Jason W. Williams*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan in Docket Nos. 152448 and 153081.

Honigman Miller Schwartz and Cohn LLP (by *Philip J. Kessler*, *Leonard M. Niehoff*, and *Robert M. Riley*) for the Fair Punishment Project in Docket No. 152448.

State Appellate Defender (by *Sofia Nelson* and *Brett DeGroff*) for the Criminal Defense Attorneys of Michigan in Docket No. 152448.

Dawn Van Hoek, *Michael Mittlestat*, and *Jessica Zimbelman* for the State Appellate Defender Office in Docket No. 153081.

Deborah A. Labelle and *Marsha L. Levick* for the Juvenile Law Center in Docket No. 153081.

MARKMAN, C.J. At issue here is whether MCL 769.25 violates the Sixth Amendment because it allows the decision whether to impose a sentence of life without

parole to be made by a judge, rather than by a jury beyond a reasonable doubt. We hold that MCL 769.25 does not violate the Sixth Amendment because neither the statute nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole; instead, life without parole is authorized by the jury's verdict alone. Therefore, we reverse the judgment of the Court of Appeals in *Skinner* and affirm the part of *Hyatt* that held that "[a] judge, not a jury, must determine whether to impose a life-without-parole sentence or a term-of-years sentence under MCL 769.25." *People v Hyatt*, 316 Mich App 368, 415; 891 NW2d 549 (2016). However, we reverse the part of *Hyatt* that adopted a heightened standard of review for life-without-parole sentences imposed under MCL 769.25 and that remanded this case to the trial court for it to "decide whether defendant Hyatt is the truly rare juvenile mentioned in [*Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012)] who is incorrigible and incapable of reform." *Hyatt*, 316 Mich App at 429. No such explicit finding is required. Finally, we remand both of these cases to the Court of Appeals for it to review defendants' sentences under the traditional abuse-of-discretion standard of review.

I. FACTS AND HISTORY

A. *SKINNER*

Following a jury trial, defendant was convicted of first-degree premeditated murder, conspiracy to commit murder, and attempted murder for acts committed when defendant was 17 years old. Defendant was sentenced to life in prison without the possibility of parole. The Court of Appeals remanded for resentencing under *Miller*, 567 US 460, which held that mandatory life-without-parole sentences for offenders under

18 years old violate the Eighth Amendment. *People v Skinner*, unpublished per curiam opinion of the Court of Appeals, issued February 21, 2013 (Docket No. 306903). This Court denied leave to appeal. *People v Skinner*, 494 Mich 872 (2013). On remand, the trial court reimposed a life-without-parole sentence. After defendant was resentenced, MCL 769.25 took effect, setting forth a new framework for sentencing juveniles convicted of first-degree murder. The Court of Appeals remanded for resentencing under MCL 769.25. *People v Skinner*, unpublished order of the Court of Appeals, entered July 30, 2014 (Docket No. 317892). On remand, the trial court again sentenced defendant to life without parole.

In a split, published decision, the Court of Appeals again remanded for resentencing, holding that a jury must decide whether defendant should be sentenced to life without parole and that, to the extent that MCL 769.25 requires the trial court to make this determination, it is unconstitutional. *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015). This Court granted the prosecutor's application for leave to appeal and directed the parties to address "whether the decision to sentence a person under the age of 18 to a prison term of life without parole under MCL 769.25 must be made by a jury beyond a reasonable doubt[.]" *People v Skinner*, 500 Mich 929, 929 (2017).

B. *HYATT*

Following a jury trial, defendant was convicted of first-degree felony murder, armed robbery, conspiracy to commit armed robbery, and possessing a firearm during the commission of a felony for acts committed when defendant was 17 years old. Following an evidentiary hearing at which the trial court considered the

Miller factors, defendant was sentenced to life in prison without the possibility of parole. In a published opinion, the Court of Appeals affirmed defendant's convictions and would have affirmed his sentence but for *Skinner*, which held that a jury must decide whether to impose a life-without-parole sentence on a juvenile. *People v Hyatt*, 314 Mich App 140; 885 NW2d 900 (2016).

The Court of Appeals declared a conflict pursuant to MCR 7.215(J) and, in a published decision, the conflict panel unanimously disagreed with *Skinner* and held that a judge may decide whether to impose a nonparolable life sentence on a juvenile. *Hyatt*, 316 Mich App at 415. However, the Court of Appeals reversed defendant's life-without-parole sentence and remanded the case to the trial court for resentencing at which "the trial court must not only consider the *Miller* factors, but decide whether defendant Hyatt is the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform." *Id*. at 429. We directed that oral argument be heard on the prosecutor's application for leave to appeal and instructed the parties to address "whether the conflict-resolution panel of the Court of Appeals erred by applying a heightened standard of review for sentences imposed under MCL 769.25." *People v Hyatt*, 500 Mich 929, 929-930 (2017).

II. STANDARD OF REVIEW

Matters of constitutional and statutory interpretation are reviewed de novo. *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016). In analyzing constitutional challenges to statutes, this Court's "authority to invalidate laws is limited and must be predicated on a clearly apparent demonstration of unconstitutionality." *People v Harris*, 495 Mich 120, 134; 845 NW2d 477

(2014). We require these challenges to meet such a high standard because "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014), citing *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003).

III. BACKGROUND

The issue here involves the interplay between the Sixth and Eighth Amendments of the United States Constitution. The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed . . . . [US Const, Am VI.]

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. [US Const, Am VIII.]

Specifically, the issue here is whether *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and its progeny require jury findings beyond a reasonable doubt before a sentence of life without parole may be imposed on a person under the age of 18 under MCL 769.25.

MCL 750.316(1) provides, in pertinent part:

> Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, a person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life without eligibility for parole:

(a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.

(b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first or second degree under [MCL 750.145n], torture under [MCL 750.85], aggravated stalking under [MCL 750.411i], or unlawful imprisonment under [MCL 750.349b].

MCL 769.25, which was enacted in the wake of *Miller*, provides, in pertinent part:

(1) This section applies to a criminal defendant who was less than 18 years of age at the time he or she committed an offense described in subsection (2) . . . .

* * *

(2) The prosecuting attorney may file a motion under this section to sentence a defendant described in subsection (1) to imprisonment for life without the possibility of parole if the individual is or was convicted of any of the following violations:

* * *

(d) Any violation of law involving the death of another person for which parole eligibility is expressly denied under state law.

(3) . . . If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after the effective date of the amendatory act that added this section. The motion shall specify the grounds on

which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.

(4) If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, the court shall sentence the defendant to a term of years as provided in subsection (9).

* * *

(6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in [*Miller v Alabama*] and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.

(7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

* * *

(9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.

In *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014), this Court noted that

> [r]ather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, MCL 769.25 now establishes a default sentencing range for individuals who commit first-degree murder

> before turning 18 years of age. Pursuant to the new law, absent a motion by the prosecutor seeking a sentence of life without parole,
>
> > the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. [*Id*. at 440, quoting MCL 769.25.]

A. UNITED STATES SUPREME COURT PRECEDENT

Apprendi, 530 US at 490, held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.) In other words, any fact that "expose[s] the defendant to a greater punishment than that *authorized by the jury's guilty verdict*" is an "element" that must be submitted to a jury. *Id*. at 494 (emphasis added). See also *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the *facts reflected in the jury verdict* or admitted by the defendant.") (emphasis altered).

In *Ring v Arizona*, 536 US 584, 609; 122 S Ct 2428; 153 L Ed 2d 556 (2002), the Court held that the jury, rather than the judge, must determine whether an aggravating circumstance exists in order to impose the death penalty.[1] In addition, in *Hurst v Florida*, 577 US ___, ___; 136 S Ct 616, 619; 193 L Ed 2d 504 (2016), the Court held that "[t]he Sixth Amendment requires a

[1] The statute at issue in *Ring* expressly required the finding of an aggravating circumstance before the death penalty could be imposed. *Id*. at 592.

jury, not a judge, to find each fact necessary to impose a sentence of death" and that "[a] jury's mere recommendation [of a death sentence] is not enough" to satisfy the Sixth Amendment.[2]

Miller, 567 US at 465, held that "*mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " (Emphasis added.) Instead, "a *judge or jury* must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id*. at 489 (emphasis added).[3] The Court indicated that the following factors should be taken into consideration: "[defendant's] chronological age and its hallmark features—among them, immaturity, impetu-

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[2] The sentencing scheme at issue in *Hurst* required the jury to render an "advisory sentence" of life imprisonment or death without specifying the factual basis of its recommendation. Although the court had the ultimate authority to impose a sentence of life imprisonment or death, if the court imposed death, it had to set forth its findings in support of that decision. *Hurst*, 577 US at ___; 136 S Ct at 622.

[3] In *Carp*, 496 Mich at 491 n 20, this Court noted *Miller*'s reference to "judge or jury" and indicated that this

> tend[s] to suggest that *Miller* did not make age or incorrigibility aggravating elements because under *Alleyne* [*v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013)] aggravating elements that raise the mandatory minimum sentence "must be submitted to the jury and found beyond a reasonable doubt[.]" However, because *Alleyne* was decided after *Miller*, *Miller*'s reference to individualized sentencing being performed by a "judge or jury" might merely be instructive on the issue but not dispositive. As none of the defendants before this Court asserts that his sentence is deficient because it was not the product of a jury determination, we find it unnecessary to further opine on this issue and leave it to another day to determine whether the individualized sentencing procedures required by *Miller* must be performed by a jury in light of *Alleyne*. [Citation and emphasis omitted.]

osity, and failure to appreciate risks and consequences"; "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; whether "he might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and "the possibility of rehabilitation . . . ." *Id*. at 477-478. Although the Court declined to address the "alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger," it stated:

> But given all we have said in *Roper*,[4] *Graham*,[5] and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Although we do not foreclose a sentencer's ability to make that judgment in

[4] In *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005), the Court held that the Eighth Amendment forbids imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

[5] In *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010), the Court held that the Eighth Amendment forbids imposition of a sentence of life without the possibility of parole for people who committed nonhomicide offenses when they were under the age of 18.

> homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [*Id*. at 479-480 (citation omitted).]

Subsequently, in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the Court held that *Miller* applies retroactively to juvenile offenders whose convictions and sentences were final when *Miller* was decided because *Miller* announced a new substantive rule by rendering life without parole an unconstitutional penalty for a specific class of juvenile defendants. *Id*. at ___; 136 S Ct at 734 (citation omitted). *Montgomery* noted that *Miller* indicated that it would be the "rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified" and that "*Miller* made clear that 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.' " *Id*. at ___; 136 S Ct at 733-734, quoting *Miller*, 567 US at 479. On this basis, *Montgomery* concluded:

> *Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.' " Because *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. [*Id*. at ___; 136 S Ct at 734 (citations omitted).]

In response to the state's argument that "*Miller* cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility," the Court stated:

> That this finding is not required . . . speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. See *Ford* [*v Wainwright*, 477 US 399, 416-417; 106 S Ct 2595; 91 L Ed 2d 335] (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences[.]"). Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue. That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment. [*Id*. at ___; 136 S Ct at 735.]

The Court concluded that "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id*. at ___; 136 S Ct at 736-737.

B. MICHIGAN COURT OF APPEALS

The Court of Appeals in *Skinner* held that MCL 769.25 violates the Sixth Amendment because it allows the decision whether to impose a sentence of life

without parole to be made by a judge, rather than by a jury beyond a reasonable doubt. The Court of Appeals reasoned that, pursuant to MCL 769.25, "following the jury's verdict and absent a prosecution motion seeking a life-without-parole sentence followed by additional findings by the trial court, the legally prescribed maximum punishment that defendant faced for her first-degree-murder conviction was imprisonment for a term of years." *Skinner*, 312 Mich App at 43. In other words, the jury's verdict only supported a term-of-years sentence. In order to impose a life-without-parole sentence, the trial court has to engage in fact-finding, and this violates defendant's Sixth Amendment right to a jury because any fact that increases a defendant's sentence must be decided by the jury.

The Court of Appeals further held that the statutory maximum penalty for first-degree murder for juveniles cannot be life without parole because this would violate *Miller* given that, under *Miller*, a mandatory default life-without-parole sentence for juveniles violates the Eighth Amendment. *Miller* requires additional fact-finding before a life-without-parole sentence can be imposed. More specifically, *Miller* requires the trial court to find that the defendant is one of those rare juvenile defendants that is irreparably corrupt and incapable of rehabilitation before the trial court can impose a life-without-parole sentence.

The *Skinner* dissent, on the other hand, concluded that there was no Sixth Amendment violation because "neither *Miller* nor the statute sets forth any particular facts that must be found before a sentence of life without parole may be imposed." *Id*. at 74 (SAWYER, J., dissenting). The dissent rejected the majority's conclusion that *Miller* requires a finding of "irreparable corruption" in order for the Eighth Amendment to

allow the imposition of a life-without-parole sentence for a juvenile. *Id*. at 76. It also rejected the majority's conclusion that MCL 769.25 creates a default term-of-years sentence, at least after the prosecutor moves for a life-without-parole sentence. *Id*. at 77.

In *Hyatt*, the Court of Appeals agreed with the Court of Appeals dissent in *Skinner* and therefore declared a conflict with *Skinner*. The conflict panel also agreed with the Court of Appeals dissent in *Skinner*. *Hyatt*, 316 Mich App at 403, held that "[t]he considerations required by *Miller*'s individualized sentencing guarantee are sentencing factors, not elements that must be found before a more severe punishment is authorized." It held that although "a sentencing judge will necessarily engage in fact-finding during the *Miller* analysis," this fact-finding will not increase the defendant's sentence beyond that authorized by the jury's verdict because the jury's verdict alone authorizes a life-without-parole sentence. *Id*. at 406. In other words, "[t]he analysis involving the *Miller* factors does not aggravate punishment; instead, the analysis acts as a means of *mitigating* punishment because it acts to caution the sentencing judge against imposing the maximum punishment authorized by the jury's verdict, a sentence which *Montgomery* cautioned is disproportionate for the vast majority of juvenile offenders[.]" *Id*. at 409 (quotation marks and citation omitted).

However, *Hyatt* also held that "a sentencing court must begin its analysis with the understanding that life without parole is, unequivocally, only appropriate in rare cases." *Id*. at 419-420. In addition, with regard to the appellate standard of review, *Hyatt* held that "the imposition of a life-without-parole sentence on a juvenile requires a heightened degree of scrutiny regarding whether a life-without-parole sentence is pro-

portionate to a particular juvenile offender, and even under this deferential standard, an appellate court should view such a sentence as inherently suspect." *Id*. at 424. Finally, *Hyatt* reversed defendant's sentence and remanded the case to the trial court for reconsideration because although the trial court considered the *Miller* factors, it did not consider whether Hyatt was "the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform," which the trial court must do before imposing a life-without-parole sentence. *Id*. at 429.[6]

IV. ANALYSIS

A. JUDGE OR JURY

These cases present a difficult issue because the pertinent United States Supreme Court opinions are not models of clarity, nor is the Legislature's response to *Miller*, i.e., MCL 769.25. Under these circumstances, it is especially important to remember that "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Sanders*, 495 Mich at 404, citing *Taylor*, 468 Mich at 6. That is,

[6] Judge BECKERING, joined by Judge SHAPIRO, wrote a concurring opinion in which she expressed her view that "a sentence of life without parole for a juvenile offender constitutes cruel or unusual punishment in violation of the Michigan Constitution," even though she recognized that this issue was "unpreserved, scantily briefed, and better left for another day." *Id*. at 430 (BECKERING, J., concurring). Judge METER, joined by Judges M. J. KELLY and RIORDAN, agreed with the majority opinion's conclusion that a judge, not a jury, is to determine whether to sentence a juvenile to life without parole. *Id*. at 447 (METER, J., concurring in part and dissenting in part). However, he dissented from the majority's review of the judge's decision to impose life without parole and its decision to remand for resentencing. Instead, he would have simply affirmed defendant's sentence. *Id*. at 448-449.

assuming that there are two reasonable ways of interpreting MCL 769.25—one that renders the statute unconstitutional and one that renders it constitutional—we should choose the interpretation that renders the statute constitutional. *Evans Prod Co v Fry*, 307 Mich 506, 533-534; 12 NW2d 448 (1943) ("[I]t is our duty to adopt such a construction, if admissible, which will uphold validity rather than destroy a legislative enactment" and " '[i]n cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act.' ") (citation omitted); *Grebner v Michigan*, 480 Mich 939, 940 (2007) ("This Court 'must presume a statute is constitutional and construe it as such, unless the only proper construction renders the statute unconstitutional.' ") (citation omitted); *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373, 408 n 27; 733 NW2d 734 (2007) ("Whenever possible, courts should construe statutes in a manner that renders them constitutional."). In the end, we do not believe that it is "clearly apparent" that MCL 769.25 is unconstitutional. *In re Sanders*, 495 Mich at 404.

The precise issue here is whether MCL 769.25 "removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone" in violation of the Sixth Amendment. *Apprendi*, 530 US at 482-483 (emphasis omitted). In other words, "[i]f the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." *Cunningham v California*, 549 US 270, 290; 127 S Ct 856; 166 L Ed 2d 856 (2007). Therefore, the pertinent question

is whether MCL 769.25 requires the trial court to find an additional fact before it can sentence a juvenile to life without parole or whether the jury's verdict alone exposes a juvenile to a life-without-parole sentence. MCL 769.25 certainly does not expressly require the court to find any particular fact before imposing life without parole, and we should not read such a requirement into the statute, especially given that doing so would render the statute unconstitutional because "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 US at 602.[7]

MCL 769.25(3) does require the prosecutor to file a motion to seek a life-without-parole sentence for a defendant less than 18 years old, and this motion must specify the grounds on which the prosecutor is requesting such a sentence. If such a motion is not filed, the trial court must sentence the juvenile to a term-of-years sentence. MCL 769.25(4) and (9). It is argued that because the "default" sentence is a term-of-years sentence, see *Carp*, 496 Mich at 458,[8] anything other

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[7] The instant cases are distinguishable from *Ring* because while the statute at issue in *Ring* expressly required the finding of an aggravating circumstance before the death penalty could be imposed, MCL 769.25 does not expressly (or otherwise) require the finding of an aggravating circumstance before life without parole can be imposed.

[8] As noted earlier, *Carp* explained that "[r]ather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, MCL 769.25 now establishes a default sentencing range for individuals who commit first-degree murder before turning 18 years of age" because "[p]ursuant to the new law, absent a motion by the prosecutor seeking a sentence of life without parole, 'the court shall sentence the individual to a term of [years].' " *Carp*, 496 Mich at 458, quoting MCL 769.25(9). A term-of-years sentence is only the "default" under MCL 769.25 when the prosecutor does not file a motion seeking a

than a term-of-years sentence, i.e., life without parole, requires that facts be found by the jury. However, this is too simplistic a view. The real question is whether, for Sixth Amendment purposes, some sort of factual finding is required to go above the "default" sentence. Just because the prosecutor has to file a motion to seek a life-without-parole sentence in order to avoid the default term-of-years sentence does not mean that additional fact-finding is required before a life-without-parole sentence can be imposed. That is, the mere fact that a term-of-years sentence constitutes the default sentence in the absence of a motion filed by the prosecutor seeking a life-without-parole sentence does not mean that the jury must find additional facts before a life-without-parole sentence can be imposed. In other words, just because some legislative procedural precondition must be satisfied after the jury renders its verdict before a life-without-parole sentence can be imposed does not mean that the facts reflected in the jury verdict alone do not authorize the imposition of a life-without-parole sentence. The critical question is whether additional factual findings have to be made, not whether an additional motion has to be filed.

However, MCL 769.25 requires more than that a motion be filed. It also requires the court to conduct a hearing to consider the *Miller* factors, MCL 769.25(6), and to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed," MCL 769.25(7). While the statute does not expressly

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life-without-parole sentence. Once the prosecutor files such a motion, there is no longer any "default" sentence. Instead, the trial court must then consider the *Miller* factors and any other relevant factors and exercise its discretion by choosing either a term-of-years sentence or a life-without-parole sentence.

require any specific finding of fact to be made before a life-without-parole sentence can be imposed, it is argued by defendants and the dissent that the statute implicitly requires a finding of fact to be made before a life-without-parole sentence can be imposed given that the statute requires the court to specify the aggravating and mitigating circumstances considered by the court and its reasons supporting the sentence imposed. In other words, although the statute does not expressly state that the trial court must find an aggravating circumstance before it imposes a life-without-parole sentence, it implicitly requires such a finding. While this argument is not unreasonable, it is also not "clearly apparent" that such a finding is required. *In re Sanders*, 495 Mich at 404.

To begin with, MCL 769.25(6) merely requires the trial court to "consider the factors listed in *Miller* . . . ."[9] The following are the factors listed in *Miller*: (1) "his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the

[9] Italics added. In addition, MCL 769.25(6) provides that the court "*may* consider any other criteria relevant to its decision, including the individual's record while incarcerated." (Emphasis added.) Given that "may" is permissive, *In re Bail Bond Forfeiture*, 496 Mich 320, 328; 852 NW2d 747 (2014), this language clearly does not require the trial court to engage in fact-finding in violation of the Sixth Amendment. Cf. *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015) (explaining that the statutory sentencing guidelines violate the Sixth Amendment because "the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under *Alleyne*") (emphasis altered).

homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; (4) whether "he might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and (5) "the possibility of rehabilitation . . . ." *Miller*, 567 US at 477-478. It is undisputed that all of these factors are mitigating factors. *Id*. at 489 ("[A] judge or jury must have the opportunity to consider *mitigating* circumstances before imposing the harshest possible penalty for juveniles.") (emphasis added). That is, these are factors that "counsel against irrevocably sentencing [juveniles] to a lifetime in prison." *Id*. at 480. The Sixth Amendment does not prohibit trial courts from considering mitigating circumstances in choosing an appropriate sentence because the consideration of mitigating circumstances does not expose a defendant to a sentence that exceeds the sentence that is authorized by the jury's verdict.[10] In other words, the Sixth Amendment only prohibits fact-finding that *increases* a defendant's sentence; it does not prohibit fact-finding

[10] In *Apprendi*, 530 US at 491 n 16, the Court emphasized the important distinction "between facts in aggravation of punishment and facts in mitigation," and it explained:

> If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

that *reduces* a defendant's sentence.[11] Therefore, the requirement in MCL 769.25(6) that the court consider the *Miller* factors does not violate the Sixth Amendment.

MCL 769.25(7), however, requires still more. It requires the court to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence

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[11] Furthermore, the United States Supreme Court does not even view the "mitigating-factor determination" (at least in the context of death-penalty cases) to constitute a factual finding. In *Kansas v Carr*, 577 US ___; 136 S Ct 633; 193 L Ed 2d 535 (2016), the Court held that mitigating circumstances, unlike aggravating circumstances, do not need to be proven beyond a reasonable doubt. In doing so, it explained that

> [w]hether mitigation exists . . . is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. [*Id*. at ___; 136 S Ct at 642.]

Similarly, in *United States v Gabrion*, 719 F3d 511, 532-533 (CA 6, 2013), the Sixth Circuit held that whether the aggravating circumstances outweigh the mitigating circumstances is not a fact that must be proved beyond a reasonable doubt. It explained:

> *Apprendi* findings are binary—whether a particular fact existed or not. [18 USC] 3593(e), in contrast, requires the jury to "consider" whether one type of "factor" "sufficiently outweigh[s]" another so as to "justify" a particular sentence. Those terms—consider, justify, outweigh—reflect a process of assigning weights to competing interests, and then determining, based upon some criterion, which of those interests predominates. The result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral—for the root of "justify" is "just." What § 3593(e) requires, therefore, is not a finding of fact, but a moral judgment. [*Id*.]

For the same reasons, a trial court's decision to impose life without parole after considering the mitigating and aggravating circumstances is not a factual finding, but a moral judgment.

imposed." *Id*. Aggravating circumstances, unlike mitigating circumstances, do have the effect of increasing a defendant's sentence. The question at issue here, however, is whether aggravating circumstances increase a defendant's sentence beyond that authorized by the jury's verdict. The answer to that question is "no," because the trial court does not have to find an aggravating circumstance in order to sentence a juvenile to life without parole.[12] If the trial court simply finds that there are no mitigating circumstances, it can sentence a juvenile to life without parole. There is nothing in the statute that prohibits this.

While the statute requires the trial court to consider the aggravating and mitigating circumstances and to specify the court's reasons supporting the sentence imposed, the court could find that there are no mitigating or aggravating circumstances and *that* is why it is imposing a life-without-parole sentence. This demonstrates that a life-without-parole sentence is authorized by the jury's verdict alone. That is, given that the statute does not require the trial court to affirmatively find an aggravating circumstance in order to impose a life-without-parole sentence, such a sentence is neces-

[12] This perhaps is the critical point at which we and the dissent disagree. The dissent concludes that because MCL 769.25(7) requires the trial court to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed," the statute necessarily requires the trial court "to find an aggravating circumstance—a fact that increases the sentence beyond that authorized by the jury verdict—before it can impose [a life-without-parole] sentence on a juvenile . . . ." We respectfully disagree. Although the statute requires the trial court to "specify on the record the aggravating and mitigating circumstances considered by the trial court," that does not necessarily mean that the trial court must specify an aggravating circumstance before it can impose a life-without-parole sentence upon a juvenile. Rather, that means simply that if the trial court *does* consider any aggravating (or mitigating) circumstances, it must specify those circumstances on the record.

sarily authorized by the jury's verdict alone.[13] And given that a life-without-parole sentence is authorized by the jury's verdict alone, additional fact-finding by the court is not prohibited by the Sixth Amendment.[14] In other words, a factual finding made by the court that an aggravating circumstance exists does not violate the Sixth Amendment because it does not expose the defendant to an enhanced sentence, i.e., a sentence that exceeds the one authorized by the jury's verdict alone. See *Apprendi*, 530 US at 481 ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking

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[13] As the Court of Appeals dissent in *Skinner* noted, that the Legislature did not include any burden of proof in the statute "further supports the conclusion that the statute does not require any particular finding of fact." *Skinner*, 312 Mich App at 74 (SAWYER, J., dissenting). As the dissent explained:

> I would suggest that the Legislature did not include a burden of proof out of oversight or a desire to leave it to the courts to fashion one, but because it was unnecessary because the statute does not require anything to be proved. Rather, it only requires consideration of the relevant criteria to guide the trial court in determining the appropriate individualized sentence for the defendant before it. [*Id*. at 74-75.]

[14] In *Blakely*, 542 US at 309, the Court explained:

> Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a *legal right to a lesser sentence*—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. [Emphasis altered.]

Under Michigan's statutory scheme, in the absence of a finding of an aggravating circumstance, a juvenile does not have a "legal right to a lesser sentence," i.e., a term of years rather than life without parole. Therefore, a judge is not precluded from considering aggravating circumstances in deciding whether to sentence a juvenile to either a term of years or life without parole because both of those sentences are within the range prescribed by Michigan's statutory scheme.

into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute.") (emphasis omitted); *Alleyne v United States*, 570 US 99, 116; 133 S Ct 2151; 186 L Ed 2d 314 (2013) ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial fact-finding, does not violate the Sixth Amendment."). The United States Supreme Court's "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Rita v United States*, 551 US 338, 352; 127 S Ct 2456; 168 L Ed 2d 203 (2007). Instead, "[t]he Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede)." *Id*. Nothing within MCL 769.25 forbids the judge from imposing a life-without-parole sentence unless the judge finds facts that the jury did not find (and the offender did not concede). In other words, MCL 769.25 does not require the trial court to make any particular factual finding before it can impose a life-without-parole sentence.

The next question is whether the Eighth Amendment, under *Miller* or *Montgomery*, requires additional fact-finding before a life-without-parole sentence can be imposed. On the one hand, there is language in both *Miller* and *Montgomery* that at least arguably would suggest that a finding of irreparable corruption is required before a life-without-parole sentence can be imposed. For example, *Miller*, 567 US at 479-480, stated:

> [G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and

> heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [Citations omitted.]

This language conceivably could be read to suggest that the sentencer must find that the juvenile offender's crime reflects irreparable corruption before a life-without-parole sentence can be imposed.

However, *Miller* clarified that it was only holding that "*mandatory* life-without-parole sentences for juveniles violate the Eighth Amendment," *id*. at 470 (emphasis added), and that "a sentencer [must] have the ability to consider the mitigating qualities of youth," *id*. at 476 (quotation marks and citation omitted). The Court expressly stated that *Miller* "does not categorically bar a penalty for a class of offenders or type of crime . . . ." *Id*. at 483. "Instead, it mandates only that a sentencer follow a certain *process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id*. (emphasis added). In other words, *Miller* simply held that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment and that before such a sentence can be imposed on a juvenile, the sentencer must consider the mitigating qualities of youth. *Miller* thus did not hold that a finding of "irreparable corruption" must be made before a life-without-parole sentence can be imposed on a juvenile.

As noted earlier, there is also language in *Montgomery* that arguably would seem to suggest that a finding of irreparable corruption is required before a life-without-parole sentence can be imposed. For example, *Montgomery*, 577 US at ___; 136 S Ct at 732, 734, held that "*Miller* announced a substantive rule," rather than a procedural rule, because *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.' " (Citation omitted.) Therefore, "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." *Id*. at ___; 136 S Ct at 734 (quotation marks and citations omitted). In other words, "[b]ecause *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect transient immaturity of youth." *Id*. at ___; 136 S Ct at 734 (quotation marks and citations omitted). See also *id*. at ___; 136 S Ct at 734 ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."). This language could also be read as suggesting that a finding of irreparable corruption or permanent incorrigibility must be made before a life-without-parole sentence can be imposed on a juvenile.

However, *Montgomery* itself expressly stated that this is not the case: "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id*. at ___; 136 S Ct at 735. *Montgomery* further explained:

> That this finding is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. See *Ford* [*v Wainwright*, 477 US 399, 416-417; 106 S Ct 2595; 91 L Ed 2d 335] (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."). Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue. That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment. [*Id*. at ___; 136 S Ct at 735 (alterations in original).]

Given that *Montgomery* expressly held that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility," *id*. at ___; 136 S Ct at 735,[15] we likewise hold that *Miller* does not require trial courts to make a finding of fact regarding a child's incorrigibility.[16]

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[15] *Montgomery*, 577 US at ___; 136 S Ct at 726, noted that "*Miller* required that sentencing *courts* consider a child's diminished culpability and heightened capacity for change before condemning him or her to die in prison." (Emphasis added; quotation marks and citation omitted.) See also *id*. at ___; 136 S Ct at 733 ("*Miller* requires that before sentencing a juvenile to life without parole, the sentencing *judge* take into account how children are different, and how those differences counsel against irrevocably sentencing them to lifetime in prison.") (emphasis added; quotation marks and citation omitted). Just as with the similar language in *Miller*, we do not place too much weight on this language given that *Montgomery*, as with *Miller*, was not addressing the Sixth Amendment issue. See note 3 of this opinion.

[16] While the dissent agrees with us that "neither *Miller* nor *Montgomery* requires a trial court to make a specific factual finding that the

Montgomery held that while the substantive rule is that juveniles who are not "irreparably corrupt" cannot be sentenced to life without parole, the states are free to develop their own procedures to enforce this new substantive rule.[17] In this sense, the "irreparable cor-

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juvenile is 'irreparably corrupt,' " it concludes that those cases require "*some* additional finding(s)," yet it does not identify *what* specifically that additional finding is other than that the juvenile's offense must be "unusual enough to warrant [a life-without-parole] sentence . . . ."

[17] Similarly, in *Atkins v Virginia*, 536 US 304, 317; 122 S Ct 2242; 153 L Ed 2d 335 (2002), the Court held that the Eighth Amendment bars the imposition of the death penalty on defendants who are intellectually disabled, but it left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (Quotation marks and citation omitted; alterations in original.) Subsequently, in *Schriro v Smith*, 546 US 6, 7; 126 S Ct 7; 163 L Ed 2d 6 (2005), the Court held that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim." Although the Court did not expressly hold that a jury trial is not required, it noted that "Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit pre-emptively imposed its jury trial condition." *Id*. at 7-8. State and lower federal courts have held that a jury need not decide whether a defendant is intellectually disabled. See, for example, *State v Agee*, 358 Or 325, 364; 364 P3d 971 (2015), amended 358 Or 749 (2016) ("[B]ecause intellectual disability is a fact that operates to reduce rather than to increase the maximum punishment permitted by a verdict of guilt, the Sixth Amendment does not require the fact of intellectual disability to be decided by a jury beyond a reasonable doubt."); *Commonwealth v Bracey*, 604 Pa 459, 474; 986 A2d 128 (2009) ("[T]here is no Sixth Amendment right to a jury on the question of mental retardation."); *State v Hill*, 177 Ohio App 3d 171, 187; 2008-Ohio-3509; 894 NE2d 108 (2008) ("[W]e reject the argument that the *Apprendi*/*Ring* line of cases requires the issue of an offender's mental retardation to be decided by a jury under a reasonable-doubt standard."); *State v Johnson*, 244 SW3d 144, 151 (Mo, 2008) ("The Supreme Court's holding in *Ring* requiring a jury to find statutory aggravating circumstances beyond a reasonable doubt does not apply to the issue of mental retardation" because "[d]etermining a defendant is mentally retarded is not a finding of fact that increases the potential range of punishment; it is a finding that removes the defendant from consideration of the death penalty."); *State v Grell*, 212 Ariz 516, 526; 135 P3d 696 (2006) ("*Ring* does not require that a jury find the absence of mental retardation."); *Walker*

v True, 399 F3d 315, 326 (CA 4, 2005) (A jury does not have to determine whether a defendant is mentally retarded because "an *increase* in a defendant's sentence is not predicated on the outcome of the mental retardation determination; only a decrease.") (quotation marks omitted); *Head v Hill*, 277 Ga 255, 258; 587 SE2d 613 (2003) ("[T]he absence of mental retardation is not the functional equivalent of an element of an offense such that determining its absence or presence requires a jury trial under *Ring*."); *In re Johnson*, 334 F3d 403, 405 (CA 5, 2003) ("[N]either *Ring* and *Apprendi* nor *Atkins* render the absence of mental retardation the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt.").

Also somewhat similarly, in *Tison v Arizona*, 481 US 137, 158; 107 S Ct 1676; 95 L Ed 2d 127 (1987), the Court held that the Eighth Amendment bars the imposition of the death penalty in felony-murder cases unless the defendant himself killed, intended to kill, attempted to kill, or was a major participant in the offense and acted with at least a reckless indifference to human life. In *Cabana v Bullock*, 474 US 376; 106 S Ct 689; 88 L Ed 2d 704 (1986), the Court discussed a case that served as a precursor to *Tison*, *Enmund v Florida*, 458 US 782; 102 S Ct 3368; 73 L Ed 2d 1140 (1982), and held that the offender's role in the offense did not concern guilt or innocence and did not establish an element of capital murder that had to be found by a jury. While *Cabana* was decided before *Apprendi*, state and lower federal courts since *Apprendi* have held that the Sixth Amendment does not require that a jury make the *Enmund*/*Tison* findings. See, for example, *State v Galindo*, 278 Neb 599, 656; 774 NW2d 190 (2009) ("*Ring* [does] not require a jury determination of *Enmund-Tison* findings" because "the *Enmund*/*Tison* determination is a limiting factor, not an enhancing factor.") (quotation marks and citations omitted); *State v Nichols*, 219 Ariz 170, 172; 195 P3d 207 (2008) ("[T]he Sixth Amendment does not require that a jury, rather than a judge, make *Enmund-Tison* findings.") (quotation marks and citation omitted). See also 6 LaFave et al, Criminal Procedure (4th ed), § 26.4(i), pp 1018-1019 ("So far, lower courts have rejected arguments to equate the factors which as a matter of Eighth Amendment law are required for death eligibility with elements. The rules in *Tison* and *Atkins* have instead been treated as defenses to, not elements of, capital murder.").

Finally, as the Court of Appeals explained in *Hyatt*, 316 Mich App at 411-412:

> The consensus in these cases is that when the Eighth Amendment's proportionality requirement has barred imposition of the death penalty because of a certain factor or factors that suggested

ruption" standard is analogous to the proportionality standard that applies to all criminal sentences. See *Montgomery*, 577 US at ___; 136 S Ct at 726 ("[A] lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.' ") (quotation marks and citations omitted). Just as courts are not allowed to impose disproportionate sentences, courts are not allowed to sentence juveniles who are not irreparably corrupt to life without parole. And just as whether a sentence is proportionate is not a factual finding, whether a juvenile is "irreparably corrupt" is not a factual finding.[18] In other words, the Eighth Amendment does not require the finding of any particular fact before imposing a life-without-parole sentence, and therefore the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole.[19]

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diminished culpability, the determination of whether those certain factors exist is not one that is subject to a jury determination. Stated differently, the Eighth Amendment prohibitions are considered to be mitigating factors that act as a bar against imposing the statutory maximum penalty, rather than as elements that enhance the maximum possible penalty, and the determination of whether those mitigating factors exist need not, under *Apprendi* and its progeny, be made by a jury.

[18] MCL 769.25 requires trial courts to consider the *Miller* factors before imposing life without parole in order to ensure that only those juveniles who are irreparably corrupt are sentenced to life without parole. Whether a juvenile is irreparably corrupt is not a factual finding; instead, it is a moral judgment that is made after considering and weighing the *Miller* factors. See note 11 of this opinion.

[19] The Court of Appeals in *Skinner*, 312 Mich App at 49, stated:

> [I]f, as the prosecution and the Attorney General contend, the "maximum allowable punishment" at the point of defendant's conviction is life without parole, then that sentence would offend the Constitution. Under *Miller*, a mandatory default sentence for juveniles *cannot* be life imprisonment without the possibility of parole. Such a sentence would not be an individualized sentence taking into account the factors enumerated in *Miller*.

This conclusion is further supported by the fact that all the courts that have considered this issue have likewise concluded that the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole. See, for example, *State v Lovette*, 233 NC App 706, 719; 758 SE2d 399 (2014) ("[A] finding of irreparable corruption is not required . . . ."); *State v Fletcher*, 149 So 3d 934, 943 (La App, 2014) ("*Miller* does not require proof of an additional element of 'irretrievable depravity' or 'irrevocable corruption.' "); *Commonwealth v Batts*, 640 Pa 401, 478; 163 A3d 410 (2017) ("We further disagree with [the defendant] that a jury must make the finding regarding a juvenile's eligibility to be sentenced to life without parole.");[20] *People v Blackwell*, 3 Cal App 5th 166, 194; 207 Cal Rptr 3d 444 (2016) ("*Miller* does not require irreparable corruption be proved to a jury beyond a reasonable doubt in order to 'aggravate' or

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Similarly, the dissent contends that "[r]eading the statute as [we do] renders meaningless the individualized sentencing required by *Miller* by allowing [life without parole] effectively to serve as the default sentence as long as the prosecutor files the motion required under MCL 769.25(2)." However, what the Court of Appeals and the dissent fail to recognize is that Michigan's statutory scheme does not create a mandatory default sentence of life without parole for juveniles. Rather, it authorizes the trial court to sentence a juvenile to life without parole as long as the trial court takes into account the *Miller* factors. In other words, Michigan's statutory scheme is absolutely *consistent* with *Miller* because instead of imposing a mandatory sentence of life without parole, it requires the trial court to impose an individualized sentence by requiring the trial court to consider the factors enumerated in *Miller*. Therefore, contrary to the dissent's suggestion, our interpretation of MCL 769.25 most certainly does not "flout[] the individualized sentencing . . . requirement[] of *Miller* . . . ."

[20] The Supreme Court of Pennsylvania held that although a finding of "permanent incorrigibility" is required, this finding can be made by the trial court because "[a] finding of 'permanent incorrigibility' cannot be said to be an element of the crime committed; it is instead an immutable characteristic of the juvenile offender." *Id*. at 456.

'enhance' the sentence for [a] juvenile offender convicted of homicide.");[21] *State v Ramos*, 187 Wash 2d 420, 436-437; 387 P3d 650 (2017) ("*Miller* . . . does not require the sentencing court . . . to make an explicit finding that the offense reflects irreparable corruption on the part of the juvenile.").

B. IMPOSITION OF LIFE WITHOUT PAROLE

Hyatt, 316 Mich App at 421, held that "the sentencing court must operate under the notion that more likely than not, life without parole is not proportionate." *Hyatt* also held that "the trial court committed an error of law by failing to adhere to *Miller*'s and *Montgomery*'s directives about the rarity with which a life-without-parole sentence should be imposed." *Id*. at 428. That is, "[w]hen deciding to sentence defendant Hyatt to life without parole, the trial court focused on the *Miller* factors[;] [h]owever, the court gave no credence to *Miller*'s repeated warnings that a life-without-parole sentence should only be imposed on the rare or uncommon juvenile offender." *Id*. Therefore, the Court of Appeals "reverse[d] defendant Hyatt's sentence and remand[ed] to the trial court for resentencing" and directed the trial court to "not only consider the *Miller* factors, but decide whether defendant Hyatt is the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform." *Id*. at 429.[22]

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[21] As *Blackwell* put it, " '[I]rreparable corruption' is not a factual finding, but merely 'encapsulates the [absence] of youth-based mitigation.' " *Id*. at 192 (alteration in original).

[22] Judge METER, joined by Judges M. J. KELLY and RIORDAN, would not have reversed defendant's sentence and remanded to the trial court for further consideration. Instead, they would have affirmed defendant's sentence of life without parole.

In addition, while *Hyatt* initially held that "appellate review of the sentence imposed is for abuse of discretion," *id*. at 423, it subsequently held that "the imposition of a life-without-parole sentence on a juvenile requires a heightened degree of scrutiny regarding whether a life-without-parole sentence is proportionate to a particular juvenile offender, and even under this deferential standard, an appellate court should view such a sentence as inherently suspect," *id*. at 424. The Court of Appeals stated, "While we do not suggest a presumption against the constitutionality of that sentence, we would be remiss not to note that review of that sentence requires a searching inquiry into the record with the understanding that, more likely than not, a life-without-parole sentence imposed on a juvenile is disproportionate." *Id*. at 425-426. Contrary to the Court of Appeals' own contention, this sounds tantamount to a presumption against life-without-parole sentences.

The Court of Appeals' opinion in *Hyatt* is internally inconsistent. On the one hand, it held that no factual finding of irreparable corruption must be made and thus that no jury is required. On the other hand, it held that the trial court erred by not explicitly deciding whether defendant is the truly rare juvenile who is irreparably corrupt. We hold that the latter conclusion is erroneous. For the reasons discussed earlier, the trial court is not obligated to explicitly find that defendant is irreparably corrupt. See *Montgomery*, 577 US at ___; 136 S Ct at 735 ("*Miller* did not require trial courts to make a finding regarding a child's incorrigibility."). The trial court also does not have to explicitly find that defendant is "rare." Indeed, we cannot even imagine how a trial court would go about determining whether a particular defendant is "rare" or not.

Miller used the word "uncommon" only once and the word "rare" only once, and when those words are read in context it is clear that the Court did not hold that a trial court must explicitly find that a defendant is "rare" or "uncommon" before it can impose life without parole. *Miller*, 567 US at 479-480, stated:

> [G]iven all we have said . . . about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the *rare* juvenile offender whose crime reflects irreparable corruption." Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [Emphasis added; citations omitted.]

The first sentence of this paragraph was simply the Court's prediction that the imposition of life without parole on juveniles will be "uncommon."[23] This is demonstrated by the use of the word "think" rather

[23] Justice Roberts, joined by Justices Scalia, Thomas, and Alito, referred to this as "the Court's gratuitous prediction." *Miller*, 567 US at 501 (Roberts, C.J., dissenting). See also *State v Valencia*, 241 Ariz 206, 212; 386 P3d 392 (2016) (Bolick, J., concurring) ("We should treat the Court's forecast that irreparable corruption will not be found in the 'vast majority' of cases as speculative and dictum. . . . Our system's integrity and constitutionality depend not on whether the overall number of sentences of life without parole meted out to youthful murderers are many or few. They depend primarily on whether justice is rendered in individual cases."). Furthermore, it is difficult to understand what particular insights or data the United States Supreme Court, or any other court, would possess concerning the *Miller*/*Montgomery* juvenile populations of this state, much less those of all fifty states, that would sustain such a prediction.

than "hold." The second sentence simply makes the point that juveniles who are irreparably corrupt are assertedly "rare." And the third sentence makes it clear that all *Miller* requires sentencing courts to do is to consider how children are different before imposing life without parole on a juvenile.

Montgomery quoted *Miller*'s references to "uncommon" and "rare." In addition, it stated: (1) "Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the *rarest* of children, those whose crimes reflect 'irreparable corruption' "; (2) *Miller* "recognized that a sentencer might encounter the *rare* juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified"; (3) "*Miller* did bar life without parole, however, for all but the *rarest* of juvenile offenders, those whose crimes reflect permanent incorrigibility"; (4) "After *Miller*, it will be the *rare* juvenile offender who can receive that same sentence"; and (5) "*Miller* drew a line between children whose crimes reflect transient immaturity and those *rare* children whose crimes reflect irreparable corruption." *Montgomery*, 577 US at ___; 136 S Ct at 733-734 (quotation marks and citations omitted; emphasis added). Again, these statements simply make the point that juvenile offenders who are deserving of life without parole are rare. To begin with, only those juvenile offenders who have been convicted of first-degree murder can be subject to life without parole, which is a small percentage of juvenile offenders. In addition, since *Miller*, the only juvenile offenders who can be sentenced to life without parole are those who have been convicted of first-degree murder and whose mitigating circumstances do not require a lesser sentence. In other words, *Miller*

and *Montgomery* simply noted that those juvenile offenders who are deserving of life-without-parole sentences are rare; they did not impose any requirement on sentencing courts to explicitly find that a juvenile offender is or is not "rare" before imposing life without parole.[24]

Similarly, neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate court. *Miller* and *Montgomery* simply require that the trial court consider "an offender's youth and attendant characteristics" before imposing life without parole. *Miller*, 567 US at 483. Indeed, there is language in *Montgomery* that suggests that the juvenile offender bears the burden of showing that life without parole is not the appropriate sentence by introducing mitigating evidence. *Montgomery*, 577 US at ___; 136 S Ct at 736 ("[P]risoners . . . must be given the opportunity to show their crime did not reflect irreparable corruption . . . .").

Finally, neither *Miller* nor *Montgomery* requires this Court to deviate from its traditional abuse-of-discretion standard in reviewing a trial court's decision to impose life without parole. This Court reviews sentencing decisions for an abuse of discretion. See *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990) ("[A] given sentence can be said to constitute an

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[24] *Miller*'s and *Montgomery*'s references to "rare" are somewhat analogous to this Court's reference to "exceptional" in *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). In *Babcock*, we stated that " 'the Legislature intended "substantial and compelling reasons" to exist only in exceptional cases.' " *Id*., quoting *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Post-*Babcock*, we certainly did not require trial courts to explicitly find that a defendant's case was "exceptional" before imposing a sentence outside the statutory sentencing guidelines.

abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."); *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017) ("[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion."). This Court has refused to review sentencing decisions de novo.

> We do not suggest that in the day-in-day-out review of sentencing issues appellate courts should simply substitute their judgment for that of the trial court. Indeed, such de novo review of sentences would be unprecedented in the realm of criminal appeals and at odds with any reasonable construction of the term "abuse of discretion." [*Milbourn*, 435 Mich at 666.]

In *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003), this Court held that a trial court's decision to depart from the guidelines will be reviewed for an abuse of discretion. As this Court explained:

> [T]he trial court is optimally situated to understand a criminal case and to craft an appropriate sentence for one convicted in such a case. . . .
>
> It is clear that the Legislature has imposed on the trial court the responsibility of making difficult decisions concerning criminal sentencing, largely on the basis of what has taken place in its direct observation. Review de novo is a form of review primarily reserved for questions of law, the determination of which is not hindered by the appellate court's distance and separation from the testimony and evidence produced at trial. The application of the statutory sentencing guidelines to the facts is
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> > not a generally recurring, purely legal matter, such as interpreting a set of legal words, say, those of an individual guideline, in order to determine their

> basic intent. Nor is that question readily resolved by reference to general legal principles and standards alone. Rather, the question at issue grows out of, and is bounded by, case-specific detailed factual circumstances. [*Buford v United States*, 532 US 59, 65; 121 S Ct 1276; 149 L Ed 2d 197 (2001).]

Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case. Accordingly, review de novo, in which a panel of appellate judges could substitute its own judgment for that of the trial court, is surely not the appropriate standard by which to review the determination that a substantial and compelling reason exists to justify a departure from the guidelines range. Instead, the appellate court must accord this determination some degree of deference.

. . . At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. . . .

Accordingly, the Court of Appeals must determine, upon a review of the record, whether the trial court had a substantial and compelling reason to depart from the guidelines, recognizing that the trial court was in the better position to make such a determination and giving this determination appropriate deference. The deference that is due is an acknowledgment of the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender. The Court of Appeals is to conduct the thorough review required by MCL 769.34(11), honoring the prohibition against departures not grounded in a substantial and compelling reason. MCL 769.34(3). In doing so, however,

> the Court must proceed with a caution grounded in the inherent limitations of the appellate perspective. [*Id*. at 267-270 (citations omitted).][25]

The same is true here. The Legislature has imposed on the trial court the responsibility of making the difficult decision regarding whether to impose a sentence of life without parole or a term of years. This decision should be based on the " 'case-specific detailed factual circumstances.' " *Id*. at 268, quoting *Buford*, 532 US at 65. "Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine" whether a life-without-parole sentence is warranted in a particular case. *Babcock*, 469 Mich at 268. "Accordingly, review de novo, in which a panel of appellate judges could substitute its own judgment for that of the trial court, is surely not the appropriate standard by which to review the determination" that a life-without-parole sentence is warranted. *Id*. "Instead, the appellate court must accord this determination some degree of deference." *Id*. at 269. "The deference that is due is an acknowledgment of the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender." *Id*. at 270.

The United States Supreme Court has also adopted an abuse-of-discretion standard for reviewing a trial court's sentencing decisions. See *Koon v United States*, 518 US 81, 97; 116 S Ct 2035; 135 L Ed 2d 392 (1996) ("[I]t is not the role of an appellate court to substitute

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[25] Although trial courts are no longer required to articulate substantial and compelling reasons to justify departures, they are still required to articulate "adequate reasons" to justify departures, and such departures are still reviewed for an abuse of discretion. *Steanhouse*, 500 Mich at 476.

its judgment for that of the sentencing court as to the appropriateness of a particular sentence.") (quotation marks and citations omitted); *Gall v United States*, 552 US 38, 41; 128 S Ct 586; 169 L Ed 2d 445 (2007) ("[C]ourts of appeals must review all sentences . . . under a deferential abuse-of-discretion standard."). In *Gall*, 552 US at 49, the Court expressly rejected the practice of "applying a heightened standard of review to sentences outside the Guidelines range," explaining that this is "inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range." As *Gall* explained:

> The sentencing judge is in a superior position to find facts and judge their import . . . in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record. The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. Moreover, [d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. [*Id*. at 51-52 (quotation marks and citations omitted).]

Particularly relevant to the instant case, *Gall* held that, since *Koon*, the Court had been "satisfied that a more deferential abuse-of-discretion standard could successfully balance the need to 'reduce unjustified disparities' across the Nation and 'consider every convicted person as an individual.' " *Id*. at 53 n 8, quoting *Koon*, 518 US at 113. The whole point of *Miller* is that mandatory life-without-parole sentences with regard to juveniles are unconstitutional and that such mandatory sentencing schemes must be replaced with

individualized sentencing schemes. See *Miller*, 567 US at 465 ("Such a scheme prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties.") (citation omitted). And the Court has already held that a deferential abuse-of-discretion standard is compatible with a sentencing scheme that considers every convicted person as an individual. See *Gall*, 552 US at 49; see also *United States v Jefferson*, 816 F3d 1016, 1019 (CA 8, 2016) (applying *Miller* to a 600-month sentence and holding that "[w]e review the substantive reasonableness of a sentence under a deferential abuse-of-discretion standard"). *Miller* called for individualized sentences, and the trial court is in a better position than an appellate court to carry this task out because the trial court will almost always be more familiar with each individual defendant than is an appellate court.[26]

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[26] As discussed earlier and as also recognized by the dissent, the United States Supreme Court expressly left it to the states to adopt procedures to satisfy the requirements of the Eighth Amendment. Where the issue is whether those procedures sufficiently satisfy the requirements of the Eighth Amendment, the de novo standard of review is applicable because that is a question of law. However, contrary to the dissent's position, where the issue pertains to the trial court's ultimate decision between a life-without-parole sentence and a term-of-years sentence, the traditional abuse-of-discretion standard of review is applicable. We are not aware of any other situation in this state in which a trial court's sentencing decision is reviewed de novo, and we see no reason why it should be in this particular situation. As discussed earlier, *Miller* requires individualized sentences and the trial court is in a better position than an appellate court to carry out this task. And *Miller* requires the trial court to consider such factors as the defendant's maturity, impetuosity, ability to appreciate risks and consequences, ability to deal with police officers or prosecutors, capacity to assist his own attorneys, and possibility of rehabilitation. The trial court is obviously in a far better position than the appellate court to assess such

Miller's and *Montgomery*'s emphasis on the rarity of juveniles deserving of life-without-parole sentences does not counsel against applying an abuse-of-discretion standard. The trial court remains in the best position to determine whether each particular defendant is deserving of life without parole. All crimes have a maximum possible penalty, and when trial judges have discretion to impose a sentence, the imposition of the maximum possible penalty for any crime is presumably "uncommon" or "rare." Yet this Court has never imposed a heightened standard of appellate review, and it should not do so in this instance.[27]

V. CONCLUSION

For these reasons, we hold that the decision to sentence a juvenile to life without parole is to be made by a judge and that this decision is to be reviewed under the traditional abuse-of-discretion standard. Therefore, we reverse the judgment of the Court of Appeals in *Skinner* and affirm that part of *Hyatt* that held that "[a] judge, not a jury, must determine whether to impose a life-without-parole sentence or a term-of-years sentence under MCL 769.25." *Hyatt*, 316 Mich App at 415. However, we reverse the part of *Hyatt* that adopted a heightened standard of review for life-without-parole sentences imposed under MCL 769.25

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factors, and thus the latter must review the trial court's consideration of these factors and its ultimate decision whether to impose a life-without-parole or a term-of-years sentence under a deferential abuse-of-discretion standard of review.

[27] Although the Court of Appeals in *Hyatt* erred by adopting a heightened standard of review with regard to the trial court's ultimate decision to impose a sentence of life without parole, it did correctly hold that "[a]ny fact-finding by the trial court is to be reviewed for clear error" and that "any questions of law are to be reviewed de novo . . . ." *Hyatt*, 316 Mich App at 423.

and that remanded that case to the trial court for it to "decide whether defendant Hyatt is the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform." *Id*. at 429. No such explicit finding is required. Finally, we remand both of these cases to the Court of Appeals for it to review defendants' sentences under the traditional abuse-of-discretion standard.[28]

ZAHRA, VIVIANO, and WILDER, JJ., concurred with MARKMAN, C.J.

MCCORMACK, J. (*dissenting*). There is much in the majority opinion with which I agree. For example, I agree that if MCL 769.25 can reasonably be construed in a constitutional manner, we should so construe it. And I generally agree with the majority's discussion of the applicable legal principles. But I respectfully dissent from the majority's conclusion that there are two reasonable ways of interpreting MCL 769.25, one of which is constitutional. Reading the statute as "murder-plus"[1] would violate the Sixth Amendment under *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and its progeny. And I disagree with the majority that reading the statute as "murder-minus"[2] cures all its constitutional deficiencies. In my view, reading the statute as murder-minus

[28] Defendant Hyatt's application for leave to appeal is otherwise denied.

[1] I use the term "murder-plus" to mean interpreting the statute to require the trial court to find facts beyond those inherent in the jury verdict before it can impose a sentence of life without parole on a juvenile.

[2] I use the term "murder-minus" to mean interpreting the statute to allow the trial court to impose a sentence of life without parole on a juvenile based solely on the jury's verdict, without finding any additional facts, and to ratchet downward to impose a term-of-years sentence.

renders it unconstitutional under the Eighth Amendment as interpreted by the United States Supreme Court in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). Read either way, MCL 769.25 suffers from a constitutional deficiency.

I. MURDER-PLUS VIOLATES THE SIXTH AMENDMENT

As the majority thoroughly explains, MCL 769.25 requires a prosecutor and a trial court to take additional steps after a jury has reached a guilty verdict in order for the court to impose a sentence of life without parole (LWOP) on a juvenile offender. The prosecutor must file a motion within the applicable time, the court must conduct a hearing at which it considers the *Miller* factors, and the court must "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7). As the majority appears to recognize, if that last step requires a trial court to make a factual finding beyond that inherent in the jury's verdict before it can impose an LWOP sentence on a juvenile, the statute would violate *Apprendi* and its progeny. See *Apprendi*, 530 US at 490 (holding that "[o]ther than the fact of a prior conviction, *any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury*, and proved beyond a reasonable doubt") (emphasis added).

The majority concludes that reading the statute as "implicitly" requiring trial courts to find an aggravating circumstance—a fact that increases the sentence beyond that authorized by the jury verdict—before it can impose an LWOP sentence on a juvenile is "not

unreasonable . . . ." *Ante* at 114. I agree; it is not. In fact it is the *more* reasonable reading of MCL 769.25(7). The plain text of that subsection requires a trial court to specify the aggravating and mitigating circumstances it considered and its reasons supporting the sentence imposed. Thus, at minimum when the trial court finds at least one aggravating circumstance as a basis to impose an LWOP sentence on a juvenile, the statute violates the Sixth Amendment by allowing the trial court to increase the defendant's sentence on the basis of facts not found by a jury.

The majority suggests that a trial court could make *no* factual findings before imposing an LWOP sentence, revealing there is no Sixth Amendment flaw in the statute. I disagree. MCL 769.25 *mandates* that the court "specify" circumstances considered and "reasons supporting" its sentencing decision as part of the hearing *mandated* before the court can impose an LWOP sentence on juvenile. It must follow that a failure to abide by the statute—imposing an LWOP sentence on a juvenile without providing such reasons—would result in an invalid sentence. I see no way to conclude that the jury verdict *alone* authorizes an LWOP juvenile sentence under the statute's plain language.

The conflict panel in *People v Hyatt*, 316 Mich App 368, 405; 891 NW2d 549 (2016), erroneously focused on the *prosecutor's* filing of a motion under MCL 769.25(2) as a significant moment resulting "in the statutory maximum [becoming] life without parole, and the trial court [having] discretion to sentence up to that statutory maximum." The flaw in that argument is that while the filing of that motion opens the door to a *potential* LWOP sentence for a juvenile, it does not alone establish a sufficient basis for a trial court to

impose such a sentence. MCL 769.25(7) does that work. Only if a trial court makes the necessary findings under Subsection (7) does the potential for punishment increase; that is, the potential for increase depends on those findings. It is the court's factual findings made under that subsection, not the prosecutor's filing of a motion under MCL 769.25(2), that "increases the penalty for a crime beyond the prescribed statutory maximum . . . ." *Apprendi*, 530 US at 490. Without those findings only a term-of-years sentence is permitted. MCL 769.25(9).[3]

MCL 769.25 is not materially distinguishable from the Arizona statute held unconstitutional in *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002). In *Ring*, as here, the statute required the trial court to determine the existence of aggravating or mitigating circumstances. Indeed, in *Ring* the statute provided that first-degree murder " 'is punishable by death or life imprisonment as provided by § 13–703.' " *Id*. at 592 (citation omitted). The statute in *Ring* thus presented the more severe punishment of death as an equally available alternative more explicitly than MCL 769.25 does with LWOP. Yet the United States Supreme Court rejected the state's argument that the defendant had been "sentenced within the range of punishment authorized by the jury verdict." *Id*. at 604. The statutes at issue both in *Ring* and here provided

[3] The *Hyatt* panel's focus on the motion permitting a *prosecutor* to *seek* an LWOP sentence as increasing the maximum is flawed, *Hyatt*, 316 Mich App at 405, because it is the *trial court's authority* to impose such a sentence that matters. And even if the prosecutor's filing of a motion under MCL 769.25(2) were considered, it would further support the conclusion that the statute violates the Sixth Amendment. The jury verdict alone does not authorize a sentence of LWOP. As conceded by the prosecutor, LWOP is only available if the prosecutor files a motion seeking an enhanced sentence.

for one punishment based on the jury verdict (in *Ring*, LWOP; here, a term of years), with an enhanced punishment available only after more proceedings and fact-finding. See also *Hurst v Florida*, 577 US ___; 136 S Ct 616, 621-622; 193 L Ed 2d 504 (2016) ("The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts.").

The majority believes that *Ring* is distinguishable because the statute in that case expressly required the finding of an aggravating circumstance before the trial court could impose the death penalty and MCL 769.25 does not require such a finding before a trial court can impose LWOP. This distinction lacks significance; in both cases the authority to impose the increased maximum hinges on the trial court's holding a hearing and making additional findings beyond those found by a jury. That MCL 769.25 does not say that a trial court cannot impose LWOP unless it first finds an aggravating circumstance makes the enhanced sentence no less contingent on the trial court's making additional findings. "When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.' " *Apprendi*, 530 US at 495, quoting *McMillan v Pennsylvania*, 477 US 79, 88; 106 S Ct 2411; 91 L Ed 2d 67 (1986).

Nor does the fact that the statute does not require a *particular* factual finding before a trial court may impose LWOP save it from Sixth Amendment peril. *Hyatt*, 316 Mich App at 399 (finding no Sixth Amend-

ment flaw in MCL 769.25 in part because it is not "a statutory scheme that makes the imposition of life without parole contingent on any particular finding"). This feature simply does not help the statute square with the applicable Sixth Amendment jurisprudence. "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." *Blakely v Washington*, 542 US 296, 305; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

Finally, the *Hyatt* panel's attempt to sidestep the Sixth Amendment flaw in MCL 769.25 because the *Miller* factors are mere "sentencing factors" rather than elements that a jury must find before the court may impose an LWOP sentence does not help. *Hyatt*, 316 Mich App at 403. The United States Supreme Court has repeatedly rejected this label-based distinction because the "inquiry is one not of form, but of effect." *Apprendi*, 530 US at 494; *Ring*, 536 US at 604 (quoting *Apprendi*). "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring*, 536 US at 610 (Scalia, J., concurring).

The factual findings required by MCL 769.25(7) are essentially a prerequisite to a trial court's ability to sentence a juvenile to LWOP; the statute tells us so. See MCL 769.25(3) through (7) (if the prosecutor moves

to have the trial court sentence the defendant to LWOP, the court shall hold a hearing and shall make findings; otherwise the trial court must sentence the defendant to the default term-of-years sentence provided in MCL 769.25(9)). The court's authority to sentence the defendant to LWOP is not "derive[d] wholly from the jury's verdict." *Blakely*, 542 US at 306. Instead, it arises only after the court makes additional factual findings that go beyond the elements of the convicted offense. The effect of those findings is the authority to impose an LWOP sentence on a juvenile. So the statutory scheme falls within the *Apprendi* rule: "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 US at 490.

In short, MCL 769.25(9) authorizes a maximum term-of-years sentence for juveniles convicted of the enumerated offenses based solely on the jury's verdict. The remainder of the statute requires motion + hearing + consideration of the *Miller* factors + a statement of aggravated and mitigating circumstances considered by the court and reasons supporting its sentence before a trial court can impose LWOP on a juvenile. For these reasons, the most reasonable reading of MCL 769.25, reading it as murder-plus, violates the Sixth Amendment of the United States Constitution under *Apprendi* and its progeny.

II. MURDER-MINUS VIOLATES THE EIGHTH AMENDMENT

But, the majority concludes, even if reading the statute as murder-plus would create a Sixth Amendment obstacle, we need not be concerned. We just read it as murder-minus instead. For the majority this is a reasonable (and constitutional) alternative reading be-

cause "the court could find that there are no mitigating or aggravating circumstances and *that* is why it is imposing a life-without-parole sentence." *Ante* at 117. That interpretation, however, suffers from its own constitutional flaw—it violates the Eighth Amendment as interpreted in *Miller* and *Montgomery*.

In *Miller*, 567 US at 465, the United States Supreme Court held that mandatory LWOP sentences for juveniles violated the requirement of "individualized sentencing for defendants facing the most serious penalties." The majority's interpretation of MCL 769.25 as murder-minus, or as allowing a trial court to impose a sentence of LWOP without making any additional findings, flouts the individualized sentencing and rigorous inquiry requirements of *Miller* and *Montgomery*.

The majority disagrees that reading the statute in this way violates *Miller* because neither *Miller* nor *Montgomery* requires a trial court to make a specific factual finding that the juvenile is "irreparably corrupt." It is right about that. See *Montgomery*, 577 US at ___; 136 S Ct at 735 (stating that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility");[4] but see, e.g., *Veal v State*, 298 Ga 691, 702; 784 SE2d 403 (2016) (concluding that *Miller* and *Montgomery* require "a specific determination that [a defendant] is *irreparably corrupt*" before a court may impose an LWOP sentence on a juvenile). But it does not follow that the court can find nothing beyond the jury's verdict before it can impose an LWOP sentence. *Montgomery* stated that the *Miller* hearing

[4] Given this statement, I find questionable the majority's assertion that "[w]hether a juvenile is irreparably corrupt is not a factual finding[.]" *Ante* at 125 n 18. But I acknowledge that other courts have reached the same conclusion. See, e.g., *People v Blackwell*, 3 Cal App 5th 166, 192, 194; 207 Cal Rptr 3d 444 (2016) (concluding that "irreparable corruption" is not a factual finding, but a "moral judgment").

"gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 577 US at ___; 136 S Ct at 735. So the majority's observation that *Miller* did not impose a specific formal fact-finding requirement is beside the point; what matters is that the Eighth Amendment requires *some* additional finding(s) supporting the legal conclusion that a juvenile's offense is unusual enough to warrant an LWOP sentence before a court may impose such a sentence. *Montgomery*, 577 US at ___; 136 S Ct at 734;[5] see also *Hyatt*, 316 Mich App at 411 ("Viewing the *Miller* factors as a means of mitigation is not to suggest, however, that life without parole remains the default sentence for juveniles convicted of first-degree murder . . . . Indeed, it is doubtful whether that result could be squared with *Miller*'s conclusions about the

[5] The United States Supreme Court in *Montgomery* recognized that there might be more than one procedural way to satisfy its dictates and left it to the states to implement. *Montgomery*, 577 US at ___; 136 S Ct at 735 ("That this finding [of incorrigibility] is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee . . . . [T]his Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."). I read the substantive rule of *Miller* and *Montgomery* as: whatever label a state puts on the "finding" a court must make as a procedural matter before it can constitutionally sentence a juvenile to LWOP (whether it be "irreparable corruption" or some proxy of that status), the court must make the finding at least cautiously and at most rarely. *Id*. at ___; 136 S Ct at 735 (describing "*Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity"); *id*. at ___; 136 S Ct at 734 ("*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption."). And of course, states can avoid concerns about what procedural protections are enough to satisfy *Miller* "by permitting juvenile homicide offenders to be considered for parole." *Id*. at ___; 136 S Ct at 736.

constitutional infirmities inherent in a mandatory life-without-parole sentencing scheme for juveniles.").

For this reason, the split of authority in state courts post-*Miller* on whether a court must make a specific "finding" of irreparable corruption misses the larger point. Before a court can sentence a juvenile to LWOP, the court must make a finding that an LWOP sentence complies with the dictates of *Miller* (whatever label or form that "finding" takes). And, as discussed later, appellate courts must review that finding de novo because it is a legal conclusion about whether the sentence is constitutional under the Eighth Amendment (while reviewing the underlying facts supporting that "finding" for clear error).

Miller requires something beyond merely a finding that all the elements of an offense are proved to sentence a juvenile to LWOP. Instead, "an offender's age" matters in determining the appropriateness of an LWOP sentence, as does "the wealth of characteristics and circumstances attendant to" youth. *Miller*, 567 US at 476. The facts necessary to establish the appropriateness of an LWOP sentence for a juvenile are therefore specific to each offender, and the facts found as part of the jury verdict itself therefore will not, standing alone, sustain such a sentence.[6] A murder-minus

[6] Thus, I cannot accept the majority's and the *Hyatt* panel's conclusion that there is no Sixth Amendment flaw in MCL 769.25 because the *Miller* factors all involve *mitigating* factors, which a jury need not find. What *Miller* and *Montgomery* require trial courts to do before imposing an LWOP sentence on a juvenile is explain why the juvenile's offense is the unusual one that warrants it; in other words, why is it *worse* than the typical juvenile offense? See *Black's Law Dictionary* (7th ed), p 236, which defines "aggravating circumstance" as "[a] fact or situation that increases the degree of liability or culpability for a tortious or criminal act"; see also *Montgomery*, 577 US at ___; 136 S Ct at 726 (stating that LWOP is inappropriate "for all but the rarest of children, *those whose crimes reflect 'irreparable corruption*' ") (citations omitted; emphasis

reading of the statute violates *Miller* because it is the very Sixth Amendment violation MCL 769.25 creates—requiring the trial court to make additional findings before sentencing a juvenile to LWOP—that the Eighth Amendment requires.[7]

Reading the statute as the majority does renders meaningless the individualized sentencing required by *Miller* by allowing LWOP effectively to serve as the default sentence as long as the prosecutor files the motion required under MCL 769.25(2). After all, if a trial court can simply hold the required hearing, consider the *Miller* factors, and declare "I find no mitigating or aggravating circumstances, so I sentence the defendant to life without parole," nothing would preclude trial courts from doing so in every case. I cannot see how *Miller*'s dictates are satisfied by the hollow formality to which the majority's holding would reduce the hearing mandated by MCL 769.25(6). And if that is the result, the statutory scheme necessarily violates the "foundational principle" that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 US at 474; see also *Landrum v State*, 192 So 3d 459, 460 (Fla, 2016) (holding that "[*e*]*ven in a*

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added). So while *Miller* may require trial courts to consider the mitigating effects of youth in determining an appropriate sentence generally, perhaps the Eighth Amendment requirement includes a finding of *aggravation* of some kind, whether it is irreparable corruption or something else.

[7] It would seem hard to dispute that the Legislature created the motion, hearing, and on-the-record findings requirements in MCL 769.25(3), (6), and (7) precisely to satisfy *Miller*'s dictates for individualized consideration of juveniles convicted of enumerated crimes. The irony that in doing so it created a Sixth Amendment problem is not lost on me. But this result is still the one that I read the applicable United States Supreme Court precedent to require given this particular statute.

discretionary sentencing scheme, the sentencing court's exercise of discretion before imposing a life sentence must be informed by consideration of the juvenile offender's 'youth and its attendant circumstances' as articulated in *Miller* and now codified in section 921.1401, Florida Statutes (2014)") (emphasis added).

Finally, for what it is worth, the *Miller* Court's statement that LWOP sentences for juveniles should be "uncommon" is entitled to some weight in analyzing this issue. *Miller*, 567 US at 479. Yes, those statements in *Miller* were a prediction, or dictum, and not a rule of law. But *Montgomery* made them harder to shrug off. See *Montgomery*, 577 US at ___; 136 S Ct at 734 (stating that "*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption' ") (quotation marks and citations omitted); *id*. at ___; 136 S Ct at 734 (stating that "*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders"); *id*. at ___; 136 S Ct at 743 (Scalia, J., dissenting) (asserting that "[i]t is plain as day that the majority is not applying *Miller*, but rewriting it"); see also, e.g., *Veal*, 298 Ga at 702 (characterizing *Montgomery* as further "explain[ing]" *Miller*'s requirements, including that "by *uncommon*, *Miller* meant *exceptionally rare*").[8]

[8] *Montgomery*'s sharpening of *Miller*'s requirements also undermines the majority's conclusion that a murder-minus reading of the statute is constitutionally sufficient because it requires sentencing courts to "consider" the *Miller* factors. *Montgomery*, 577 US at ___; 136 S Ct at 734 (stating that "because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth") (cleaned up). In other words, the Eighth Amendment requires the sentencing court to find *some facts* about a

In my view, interpreting the statute as murder-minus renders it constitutionally flawed under the Eighth Amendment. Instead, I believe that "a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole." *Commonwealth v Batts*, 640 Pa 401, 472; 163 A3d 410 (2017);[9] see also *Atwell v State*, 197 So 3d 1040, 1050 (Fla, 2016) (invalidating under the Eighth Amendment a defendant's sentence because he "did not receive the type of individualized sentencing consideration *Miller* requires"). Because a murder-minus interpretation of MCL 769.25 does not allow for such a presumption, I conclude that the majority's interpretation violates *Miller*.

III. *MILLER* REQUIRES A HEIGHTENED STANDARD OF REVIEW FOR JUVENILE LWOP SENTENCES

Even if I could agree with the majority that MCL 769.25 is constitutional, in my view *Miller* requires appellate courts to apply a more searching review to juvenile LWOP sentences than our traditional abuse-of-discretion standard. This is so because the review is of the *legality* of the sentence; if the sentence is illegal, the court has no discretion to impose it. "[I]n the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will forever be incorrigible, without any hope for reha-

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particular juvenile's crime that distinguish it from the typical juvenile offense before it may impose an LWOP sentence.

[9] Other state supreme courts have similarly concluded that *Miller* requires a presumption against imposing LWOP on a juvenile offender. See, e.g., *Davis v State*, 415 P3d 666, 681; 2018 WY 40 (2018), citing *State v Riley*, 315 Conn 637, 655; 110 A3d 1205 (2015); *State v Seats*, 865 NW2d 545, 555 (Iowa, 2015).

bilitation, a life-without-parole sentence imposed on a juvenile is illegal, as it is beyond the court's power to impose." *Batts*, 163 A3d at 435.

Whether a juvenile LWOP sentence is a proper exercise of a sentencing judge's *discretion* therefore is the wrong inquiry; the correct inquiry is whether such a sentence is constitutional under the Eighth Amendment and *Miller*. We review constitutional questions de novo. Why would we make an exception to that rule here? And other courts have rightly recognized that de novo review of such sentences is appropriate. "[W]e must review the sentencing court's legal conclusion that [the defendant] is eligible to receive a sentence of life without parole pursuant to a de novo standard and plenary scope of review." *Id*.; see also *State v Seats*, 865 NW2d 545, 553 (Iowa, 2015) (stating that "[w]hen a defendant attacks the constitutionality of a sentence, our review is de novo"); *Davis v State*, 415 P3d 666, 676; 2018 WY 40 (2018) (stating that "we review a constitutional challenge to a sentence de novo").

Such a conclusion is consistent with the majority's discussion of the traditional abuse-of-discretion standard and why we apply it to sentencing decisions in the ordinary course. In *People v Babcock*, 469 Mich 247, 268-269; 666 NW2d 231 (2003), we observed that "[r]eview de novo is a form of review primarily reserved for questions of law" and that "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." But a decision whether a particular sentence satisfies *constitutional* scrutiny under *Miller* is precisely the sort of question of law to which there is only one correct answer—the sentence is either constitutional or it is not. There is no room for

discretion and therefore no reason for an appellate court to defer to the trial court's decision when reviewing the sentence for Eighth Amendment compliance.[10]

As a result, while I disagree with the *Hyatt* conflict panel's decision to cast the standard of review applicable to juvenile LWOP sentences as a heightened version of the traditional abuse-of-discretion standard, I agree with its bottom line: Appellate courts should apply a less deferential review to juvenile LWOP sentences. I would simply call the standard what it is—de novo review.

IV. CONCLUSION

I respectfully dissent from each of the majority's holdings. I would conclude that MCL 769.25 is unconstitutional because its most natural reading requires a

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[10] The majority replies by conceding that de novo review applies to questions of law, but denies that a trial court's sentencing decision to impose an LWOP sentence on a juvenile is such a question. That conclusion, frankly, simply ignores that *Miller* constitutionalized this particular area of law and that *Montgomery* declared it a substantive, rather than a procedural, rule of law. See *Montgomery*, 577 US at ___; 136 S Ct at 736 (stating that "[t]he Court now holds that *Miller* announced a substantive rule of constitutional law"); see also *id*. at ___; 136 S Ct at 735 (stating that "[t]he hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity"). Even the *Montgomery* primary dissent, albeit begrudgingly, acknowledged this. See *id*., 577 US at ___; 136 S Ct at 743-744 (Scalia, J., dissenting) (asserting that "the rewriting [of *Miller*] has consequences beyond merely making *Miller*'s procedural guarantee retroactive. *If, indeed, a State is categorically prohibited from imposing life without parole on juvenile offenders whose crimes do not 'reflect permanent incorrigibility,' then even when the procedures that* Miller *demands are provided the constitutional requirement is not necessarily satisfied. It remains available for the defendant sentenced to life without parole to argue that his crimes did not in fact 'reflect permanent incorrigibility' "*) (emphasis added).

trial court to make factual findings beyond those found by the jury before it can impose an LWOP sentence on a juvenile. I would decline to read the statute not to require such findings before a court can impose an LWOP sentence on a juvenile because I believe such a reading violates the Eighth Amendment as the United States Supreme Court has made plain in *Miller* and *Montgomery*. Finally, given that the majority holds the statute constitutional, I also dissent from its conclusion that traditional abuse-of-discretion review applies to juvenile LWOP sentences. Whether the sentence is constitutional, like any constitutional question, requires our de novo review.

BERNSTEIN, J., concurred with MCCORMACK, J.

CLEMENT, J., took no part in the decision of this case.

In re MARDIGIAN ESTATE

Docket No. 152655. Argued December 6, 2017 (Calendar No. 1). Decided June 21, 2018.

Attorney Mark S. Papazian submitted in the Charlevoix County Probate Court the will and trust he had drafted for the decedent, Robert D. Mardigian, who was an unrelated friend. Melissa Goldberg, Susan Lucken, and others contested the documents on the ground that Papazian had drafted them in violation of the Michigan Rules of Professional Conduct (MRPC) because they made Papazian and his children the recipients of the bulk of the decedent's estate in contravention of public policy and MRPC 1.8(c), which generally prohibits an attorney from preparing an instrument that gives the attorney or his or her close family a substantial gift. The court, Frederick R. Mulhauser, J., granted partial summary disposition in favor of the challengers, and Papazian appealed, arguing that Michigan did not recognize a per se bar on testamentary gifts to unrelated attorneys and that a breach of MRPC 1.8(c) supplied a basis only for invoking the attorney disciplinary process, not for automatically voiding a trust or will. The Court of Appeals, WILDER, P.J., and STEPHENS, J. (SERVITTO, J., dissenting), reversed, holding that, under *In re Powers Estate*, 375 Mich 150 (1965), the documents were not necessarily invalid, but Papazian was required to overcome a presumption of undue influence arising from the attorney-client relationship in order to enforce them. 312 Mich App 553 (2015). The challengers applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 499 Mich 973 (2016). After hearing oral argument, the Supreme Court granted the application for leave to appeal. 500 Mich 1030 (2017).

The judgment of the Court of Appeals was affirmed by equal division.

Chief Justice MARKMAN, joined by Justices ZAHRA and CLEMENT, writing for affirmance, stated that, under the applicable provisions of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., and the underlying principles of probate law, the rebuttable presumption of undue influence articulated in *Powers*

should apply to these circumstances. A new per se rule that would prohibit an attorney from drafting an instrument that names himself or herself as a beneficiary would not only be contrary to the fundamental principles of probate law and longstanding precedents of this state, but would also run afoul of EPIC, whose underlying purposes and policies include the discernment and effectuation of the decedent's intentions in the distribution of his or her property and whose express provisions require the contestant to bear the burden of establishing undue influence. The adoption of MRPC 1.8(c) had no effect on this conclusion because a breach of this rule only triggers the invocation of the attorney disciplinary process; it does not breach EPIC. Chief Justice MARKMAN would have affirmed the judgment of the Court of Appeals for these reasons.

Justice MCCORMACK, joined by Justices VIVIANO and BERNSTEIN, writing for reversal, would have overturned *Powers* to the extent that it held that courts should apply a mere presumption of undue influence to a will contest in which an attorney drafted a testamentary document that names himself or herself as a beneficiary and would instead have adopted a per se rule of undue influence that voids substantial testamentary gifts to attorney-drafters. Justice MCCORMACK stated that a per se rule would reflect updates to the relevant ethics rules, probate law, and evidentiary presumptions and would ensure that a testator's intent is effectuated by eliminating the possibility that the testamentary instrument was the product of undue influence, noting that the contrary approach would leave clients vulnerable, reward unscrupulous attorneys, and encourage costly litigation. Accordingly, Justice MCCORMACK would have reversed the Court of Appeals.

Affirmed by equal division.

Justice WILDER took no part in the decision of this case because he was on the Court of Appeals panel.

Young & Associates, PC (by *Rodger D. Young* and *J. David Garcia*) for Mark S. Papazian.

Miller, Canfield, Paddock and Stone, PLC (by *Clifford W. Taylor*; *Gerald J. Gleeson, II*; *Paul D. Hudson*; *and Dawn M. Schluter*) for Edward Mardigian, Grant Mardigian, and Matthew Mardigian.

Ahern & Kill, PC (by *Joseph A. Ahern* and *Amanda A. Kill*) for Melissa Goldberg.

Bendure & Thomas (by *Marc E. Thomas*) for Nancy Varbedian and Susan V. Lucken.

Amici Curiae:

Robert E. Edick for the Attorney Grievance Commission.

Barron, Rosenberg, Mayoras & Mayoras, PC (by *Andrew W. Mayoras*) and the *Law Office of Kurt A. Olson, PC* (by *Kurt A. Olson*) for the Probate and Estate Planning Section of the State Bar of Michigan.

MARKMAN, C.J. (*for affirmance*). At issue is whether the rebuttable presumption of undue influence is applicable when the decedent's attorney breaches Michigan Rule of Professional Conduct (MRPC) 1.8(c), which generally prohibits an attorney from preparing an instrument giving the attorney or his or her close family a substantial gift. Appellants argue that a breach of MRPC 1.8(c) automatically renders an instrument void, while the appellee attorney argues that, rather than an invalidation of the instrument, a rebuttable presumption of undue influence arises in these circumstances. After considering the applicable provisions of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., and the underlying principles of probate law, it becomes clear to us that a rebuttable presumption applies to these circumstances. And, as we will explain, creating a new per se rule as appellants advocate would not only be contrary to the fundamental principles of probate law and longstanding precedents of this state but would also run afoul of EPIC. Moreover, the adoption of MRPC 1.8(c) has no effect on this

conclusion because a breach of this rule, like breaches of other professional conduct rules, only triggers the invocation of the attorney disciplinary process; it does not breach the statutory law of EPIC. For these reasons, we conclude the Court of Appeals correctly held that, in the instant circumstances, existing statutes and caselaw give rise only to a rebuttable presumption of undue influence.

I. FACTS AND HISTORY

On August 13, 2010, the decedent, Robert Mardigian, executed an amended trust that was prepared by appellee Mark Papazian, and on June 8, 2011, the decedent executed a will prepared by Papazian. The amended trust and will operated to leave the bulk of the decedent's estate to Papazian, who was a close friend of the decedent, and to Papazian's children. On January 12, 2012, the decedent died.

Following the decedent's death, Papazian filed an action in the probate court and sought to introduce the amended trust and will. Appellants, who consist of the decedent's brother, two nephews, two nieces, and girlfriend, challenged the introduction of these documents, moving for summary disposition and requesting that the probate court void all gifts to Papazian and his children as a matter of law. Specifically, they argued that the gifts were contrary to public policy under MRPC 1.8(c).[1] The probate court eventually granted summary disposition in favor of the appellants and declined to admit the amended trust and will, explain-

[1] MRPC 1.8(c) states, "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."

ing that it was "disinclined to enforce" documents that were prepared contrary to the MRPC.

Papazian appealed, arguing that Michigan did not recognize a per se bar on testamentary gifts to unrelated attorneys and that a breach of MRPC 1.8(c) supplied a basis only for invoking the attorney disciplinary process, not for automatically voiding a trust or will. In a split decision, the Court of Appeals reversed the probate court's order granting summary disposition in favor of appellants. Relying on this Court's decision in *In re Powers Estate*, 375 Mich 150; 134 NW2d 148 (1965), the majority held that it was "required to remand for further proceedings, in which [Papazian] will be required to overcome the presumption of undue influence arising from the attorney-client relationship in order for the devises left to him and his family to be enforced." *In re Mardigian Estate*, 312 Mich App 553, 559; 879 NW2d 313 (2015). Pointing to the fact that *Powers* had been decided before this Court adopted MRPC 1.8(c), Judge SERVITTO dissented and would have affirmed the probate court's ruling that the gifts to Papazian and his family were void as against public policy. *Id*. at 570 (SERVITTO, J., dissenting).

Thereafter, appellants sought leave to appeal in this Court. We ordered oral argument on whether to grant the application or take other action and directed the parties to address whether this Court should overrule *Powers*. *In re Mardigian Estate*, 499 Mich 973 (2016). Subsequently, we granted the application for leave to appeal and directed the parties to address whether the rebuttable presumption set forth in *Powers* sufficiently protected a decedent and what role this Court's later adoption of MRPC 1.8(c) should play in the consideration of the issue. *In re Mardigian Estate*, 500 Mich 1030 (2017).

II. STANDARD OF REVIEW

A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 309; 901 NW2d 577 (2017). In addition, the resolution of this case requires the interpretation of statutes, which we also review de novo. *Id*.

III. ANALYSIS

For the reasons that follow, both the historical framework under which we have analyzed gifts to attorneys and the current statutory framework, which codified the historical framework, require us to uphold *Powers* and its rebuttable presumption of undue influence, notwithstanding the later adoption of MRPC 1.8(c).

A. HISTORICAL FRAMEWORK

One of the underlying purposes and policies of EPIC is "[t]o discover and make effective a decedent's *intent* in distribution of the decedent's property," MCL 700.1201(b) (emphasis added), but this purpose long predates EPIC and is entrenched deeply within the history of this state's probate law. Discovering and giving effect to this intent has been viewed as the foundational standard of probate law for centuries. See, e.g., *In re Blodgett's Estate*, 197 Mich 455, 461; 163 NW 907 (1917) (citing seventeenth-century jurist Lord Coke for the proposition that a testator's intent constitutes " 'the polar star to guide judges in their determination' "). See also *id*. at 461, quoting 4 Kent, Commentaries on American Law (14th ed), p 534 (" 'The intention of the testator is the first and great object of inquiry; and to this object technical rules are, to a

certain extent, made subservient.' "); *Palms v Palms*, 68 Mich 355, 378; 36 NW 419 (1888) (opinion by CHAMPLIN, J.) ("In construing wills, it is well settled that the intent of the testator must be ascertained and carried into effect so far as it legally can be done."); *In re Churchill's Estate*, 230 Mich 148, 155; 203 NW 118 (1925) ("In the construction of wills the cardinal canon, the guiding polar star, is that the intent of the testator must govern . . . .").

At the same time, however, " '[u]ndue influence' exercised upon one who executes a will may become the basis for finding the will invalid *if that influence took from the testator his right to freely exercise his discretion* in disposing of his property." *In re Sprenger's Estate*, 337 Mich 514, 521-522; 60 NW2d 436 (1953) (emphasis added).[2] This is because undue influence is "something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator." *In re Williams' Estate*, 185 Mich 97, 120; 151 NW 731 (1915) (quotation marks and citation omitted). The burden of establishing undue influence has historically reposed with the party asserting it. *In re Sprenger's Estate*, 337 Mich at 522 (stating that undue influence "must be proved by the person seeking to have the will declared invalid"). And as this Court has explained:

> To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. Motive, opportunity, or even ability to control, in the absence of

[2] Similarly, "[a] trust is void to the extent its creation was induced by fraud, duress, or undue influence." MCL 700.7406.

> affirmative evidence that it was exercised, are not sufficient. [*In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003) (quotation marks and citation omitted).]

Additionally, there are occasions in which a rebuttable presumption of undue influence can arise:

> The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*Id*. at 73 (quotation marks and citation omitted).]

This rebuttable presumption has been said to apply to cases in which "a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser, whether for his own personal advantage, or for the advantage of some interest of which he is a representative." *In re Hartlerode's Estate*, 183 Mich 51, 60; 148 NW 774 (1914). For well over a century, this rebuttable presumption has been applied to circumstances in which an attorney drafts a will providing that attorney with a gift from a client. See, e.g., *In re Bromley's Estate*, 113 Mich 53, 54; 71 NW 523 (1897) ("[A] bequest in favor of an attorney who draws a will is a circumstance arousing suspicion, and raises a presumption more or less strong that undue influence has been exerted . . . .").

Most significantly, in *Powers*, this Court specifically discussed the rebuttable presumption of undue influence as it arises when an attorney drafts a will in his or her own favor. The will in *Powers* had been drafted by an attorney who was married to the decedent's close friend, and it left substantial portions of the decedent's estate to both the attorney and the close friend (i.e., the

attorney's wife). *In re Powers Estate*, 375 Mich at 155-157. *Powers* began by recognizing the inherent ethical misconduct of the attorney: "If any prizes were to be awarded for dismal professional judgment, the proponent here would be in a fair way to be signally recognized." *Id*. at 157.[3] However, *Powers* proceeded to explain that the conduct of the attorney was not what was at issue; rather, the issue was whether the will itself was valid. *Id*. In light of this understanding, the attorney-client relationship was only relevant insofar as it tainted the validity of the will:

> The issue of the relationship of the attorney and his client, and the attorney and his wife as beneficiaries, is an additional element in the broader concept of undue influence. Essentially it goes to degree of proof necessary to establish prima facie the opportunity for the exercise of undue influence and the ultimate consideration of that question by the trier of the facts . . . .
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> * * *

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[3] Although the MRPC was not in existence at the time of *Powers*, an attorney drafting a will who had undertaken to make a gift in his or her own favor was nonetheless well recognized as unethical decades before *Powers*. As the concurring justice in *Powers* explained:

> [T]his Court almost 60 years ago bluntly warned the profession against such conduct, in [*Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907)]:
>
> > By statute, a bequest to a subscribing witness, necessary for proving the will, is declared absolutely void (CL 1897, § 9268), and this, though the subscribing witness may be and generally is ignorant of the contents of the will. Although there is no statute to invalidate a bequest to a scrivener, the reasons are, at least, as strong for such a statute as in the case of the subscribing witness. I believe it to be generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor, and this Court has held that such dispositions are properly looked upon with suspicion.
>
> [*Powers*, 375 Mich at 181 (SOURIS, J., concurring).]

> This will contest is on no different legal and factual basis than any other in our past jurisprudence and we caution court and counsel if the case is retried to *confine* the testimony to the issues:
>
> (1) The well-defined, well-recognized test of the testatrix' competency to execute the testamentary instrument . . . ;
>
> (2) The equally well-defined and well-recognized issue of the exercise of fraud or undue influence in the execution thereof, including any presumption created by the fact that proponent was deceased's attorney and the fact that he drew the instrument . . . . [*Id*. at 157-158, 179 (emphasis added).]

As *Powers* recognized, the focus of the will contest is to determine the decedent's intention and not to judge and discipline the attorney's conduct. *Id*. at 178 ("The forum in which to test unprofessional conduct of an attorney in this State is adequately supplied in the State Bar grievance procedure. The forum in which not to test it is a jury trial determining testamentary capacity and undue influence."). Thus, that an attorney drafted a will giving a gift in his or her own favor only affects the will contest insofar as that is relevant to the rebuttable presumption of undue influence and the determination by the fact-finder whether such influence had been exerted.

In addition, our longstanding caselaw indicates that even when the rebuttable presumption of undue influence arises, "the burden does not rest upon the [proponent of the will] to show that the transaction was free from undue influence." *Hill v Hairston*, 299 Mich 672, 679; 1 NW2d 34 (1941). That is, the presumption historically did not shift the ultimate burden of proof to show undue influence. *In re Bailey's Estate*, 186 Mich 677, 692, 694; 153 NW 39 (1915) ("It is true that a presumption is raised that calls for an explanation, but the burden of proof to show undue influence is not

thereby shifted. . . . [T]he burden of proof to show undue influence rest[s] upon the contestant, and not the proponent. Such, we think, is the settled law in this State."). See also *In re Jennings' Estate*, 335 Mich 241, 244; 55 NW2d 812 (1952) (stating that "there is no shifting of the burden of proof under the presumption" and "while it establishes a prima facie case in the absence of testimony on the subject, [the presumption itself] has no weight as evidence, is rebuttable, and cannot be weighed against evidence").[4]

In summary, even when a rebuttable presumption of undue influence has arisen, this Court has held that it does not shift the ultimate burden of proof; rather, that burden always remains with the contestant. This historical framework remains in place today but has now been incorporated through statute rather than existing exclusively in caselaw.

B. EPIC FRAMEWORK

In 1998, the Michigan Legislature enacted EPIC, which became effective April 1, 2000. 1998 PA 386. As

[4] As this Court explained in *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985), although a presumption itself should not be weighed as evidence, the inferences drawn from the facts creating the presumption may be weighed as evidence:

> [T]he function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.
>
> Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence.

part of EPIC, the Legislature codified the applicable burdens of proof in will disputes in MCL 700.3407(1), which provides in pertinent part:

> All of the following apply in a contested case:
>
> * * *
>
> (c) A contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation.
>
> (d) A party has the ultimate burden of persuasion as to a matter with respect to which the party has the initial burden of proof.[5]

As MCL 700.3407(1) shows, the *contestant* bears the burden of establishing undue influence, and this burden of persuasion remains throughout with the contestant. Notably, there are no exceptions in this regard. Accordingly, even where a *rebuttable* presumption of undue influence has arisen, EPIC still requires that the *contestant* establish undue influence and that the ultimate burden of persuasion remain with the contestant.[6] These requirements of EPIC are consistent with

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[5] The term "burden of proof" encompasses two distinct concepts: (1) the burden "of producing evidence, satisfactory to the judge, of a particular fact in issue"; and (2) "the burden of persuading the trier of fact that the alleged fact is true." 2 McCormick, Evidence (7th ed), § 336, p 644. The latter burden, which can be referred to as "the risk of nonpersuasion," has been described as follows: "It marks . . . [t]he peculiar duty of him who has the risk of any given proposition on which parties are at issue,—who will lose the case if he does not make this proposition out, when all has been said and done." *Id*. at 644 n 4 (quotation marks and citation omitted; alterations in McCormick).

[6] Although there is no specific EPIC provision that sets forth the applicable burden of proof for trust contests, the burden of establishing fraud or undue influence reposes in the party who asserts it even outside the context of wills, see *Hill*, 299 Mich at 678-680 (holding that in a challenge to an *inter vivos* gift, the burden lies with the contestant to show undue influence and that the rebuttable presumption of undue

the historical framework discussed earlier, and the enactment of MCL 700.3407(1) remains in this regard a codification of existing law.[7]

Because EPIC and our rules of evidence each require that a will or trust contestant establish undue influence and that the ultimate burden of persuasion remains with the contestant despite any presumption that may arise, we see no basis to revisit the merits of *Powers*. Indeed, it may largely be immaterial whether

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influence does not shift that burden), and the rules of evidence further provide a framework that is consistent with how MCL 700.3407(1) treats presumptions and the ultimate burden of persuasion for wills:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. [MRE 301.]

Accordingly, under MRE 301, we believe that the same framework employed for wills is also appropriate in trust disputes. We are aware of no policy that would counsel any different standard.

[7] In addition to the fact that MCL 700.3407(1) plainly evidences the codification of existing law, commenters have concurred in this proposition:

> Under former Michigan law, burdens of proof were addressed by case law. This statutory statement is intended to restate existing law without change. This provision [i.e., MCL 700.3407(1)] indicates that the presumption of undue influence (which often arises in cases in which there was a confidential relationship between the decedent and another who benefits from the will) does not change the ultimate burden of persuasion; it only shifts the burden of going forward with the evidence. [Martin, *Estates and Protected Individuals Code with Reporters' Commentary* (ICLE, 2001), at 177.]

The opinion in support of reversal asserts that the instant citation constitutes a "novel use of legislative history." However, we do not rely on the above to *confer* meaning upon EPIC; it is merely cited as consistent with what we have argued the text *already* shows.

Powers was correctly decided—although we believe that it was—because the Legislature itself subsequently adopted the same historical framework in its enactment of EPIC, which we are bound to follow.

C. PER SE APPROACH

Appellants now ask us to disregard this historical framework and adopt a per se rule of undue influence under which a testamentary gift to a drafting attorney is automatically void when there has been a breach of MRPC 1.8(c). However, we believe that such an approach is inappropriate for several reasons.

First, a per se approach would wholly ignore any genuine consideration of the decedent's *intentions*, which as noted would violate both a foundational principle of probate law in general and one of EPIC's expressly stated policies. See *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983) ("A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible."); *In re Churchill's Estate*, 230 Mich at 155 ("In the construction of wills the cardinal canon, the guiding polar star, is that the intent of the testator must govern . . . ."); MCL 700.1201(b) (one of the underlying purposes of EPIC is "[t]o discover and make effective a decedent's intent in distribution of the decedent's property"); MCL 700.8201(2)(c) (one of the underlying purposes and policies of the Michigan Trust Code (MTC), which is set forth as Article VII of EPIC, is "[t]o foster certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust"). Under a per se rule of undue influence, any attempt to discern the genuine and bona fide intention of the testator is subordinated at an

early juncture to consideration of the attorney's conduct. And thus the "guiding polar star" that is the decedent's intention comes to be diminished in favor of an assessment of the behavior of his or her legal representative.[8]

Second, the per se approach is contrary to both MCL 700.3407(1)(c) and MCL 700.3407(1)(d), which respectively provide that a will contestant bears the burden of establishing undue influence and that the ultimate burden of persuasion remains with the party who had the initial burden of proof, i.e., the contestant. A per se rule of undue influence would altogether nullify these requirements by relieving the contestant of the burden to establish undue influence in circumstances in which the gift has been made to an attorney. For this same reason, the per se approach in the context of a trust challenge would improperly shift the burden of persuasion, contrary to MRE 301.

The opinion in support of reversal asserts that a per se rule of undue influence would not abrogate the contestant's burden to show undue influence because "[t]he contestant would have to show that the attorney violated MRPC 1.8(c), which requires showing (1) the attorney drafted the provision leaving himself a gift, (2) the gift was 'substantial,' and (3) the attorney and client were not related." We disagree. Such a showing does not establish undue influence in any meaningful sense; rather, it merely shows that there has been a breach of MRPC 1.8(c). As noted earlier, the precise nature of the "undue influence" necessary to invalidate

[8] The opinion in support of reversal states, "Because I agree with the affirming opinion that *protecting testator intent* is our goal, I would adopt a per se rule of undue influence for attorney-drafters." (Emphasis added.) Respectfully, we simply do not understand what this means. A per se rule effectively and completely forecloses any opportunity for a fact-finder to discover the testator's genuine intentions.

a will is "something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator." *In re Williams' Estate*, 185 Mich at 120 (quotation marks and citation omitted). See also *In re Sprenger's Estate*, 337 Mich at 521-522 (" 'Undue influence' exercised upon one who executes a will may become the basis for finding the will invalid if that influence took from the testator his right to freely exercise his discretion in disposing of his property."). Whether there has been a breach of MRPC 1.8(c) does not address whether the decedent's free agency has been destroyed; it addresses only and obviously whether there has been a breach of MRPC 1.8(c).

Third, the issue whether a per se rule of undue influence is appropriate simply boils down, in our judgment, to enacting substantive public policy, which is the responsibility of the Legislature, not this Court. The opinion in support of reversal maintains that the instant opinion "leaves clients vulnerable, rewards unscrupulous attorneys, [and] encourages costly litigation"; however, we believe that the instant opinion best accords both with the *law* and with longstanding practice under that *law*, in particular, with its dominant focus on ascertaining the genuine intentions of the testator.[9] In place of that focus, the opinion in

[9] The opinion in support of reversal responds that the instant opinion "seems to presume that [the decedent's intent] is easily knowable. But that's exactly the problem. It's not." What we have said specifically, and what we now add in response, is as follows: (a) the decedent presumably knew his *own* intent and had every reason to assume that *that* intent would matter in probate; it does not to the other opinion; (b) of course, it is true that neither this Court, nor likely anyone else, knows the decedent's intent with the clarity and certainty with which the *decedent himself* knew that intent; (c) nonetheless, our legal system *does* presume that such intent is "knowable"; it is presumably made "knowable" by what is characterized as "evidence," in particular, evidence concerning

support of reversal would introduce an irrebuttable legal presumption under which such intentions would simply be of no consequence in cases in which the presumption applied.

Whether the current probate framework is sufficient to protect a decedent requires difficult policy determinations that involve balancing the decedent's intentions with policies sanctioning unethical attorney conduct. And as this Court has explained:

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's. [*Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002) (quotation marks and citation omitted).]

If the current policy framework is insufficient to protect a decedent when MRPC 1.8(c) has been breached, and any further inquiry into the decedent's intentions should be compromised or foreclosed, it is the Legislature that ought to make this determination and pro-

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the language of the will and evidence of relevant surrounding circumstances; (d) if, as the other opinion asserts, the "exact" problem is that the decedent's intent is not "knowable," then it is difficult to understand what fundamental premises inform the probate process in this case; (e) ascertaining the decedent's intent here should proceed as it does in all other cases in which there are questions concerning the decedent's intent and by the same standards; there are often complications when it becomes necessary to look beyond the four corners of a will to discern intent, but courts nonetheless undertake in these circumstances, to the best of their ability, to discern intent; and (f) however difficult or imperfect the probate process may sometimes be—no one has suggested that it involves an "easy" determination in this case—the instant opinion has as its *standard* of inquiry the discernment of Robert Mardigian's intent and the other opinion does not.

vide for an appropriate limiting rule. See, e.g., *Agee v Brown*, 73 So 3d 882, 886 (Fla App, 2011) ("The best way to protect the public from unethical attorneys in the drafting of wills . . . is entirely within the province of the Florida Legislature."); *Sandford v Metcalfe*, 110 Conn App 162, 169-170; 954 A2d 188 (2008) ("[I]t is ill-advised, as a matter of public policy, for an attorney to draft a will in which she is to receive a bequest"; "[t]here is, however, no statute barring an attorney who drafted a testamentary instrument from inheriting by the instrument she drafted"; and "[i]f the law is to be changed to make provision for the situation at hand, it is for the legislature to make the change, not the court.").

Fourth, in specific circumstances in which the Legislature has deemed a disposition inappropriate *without regard* to the decedent's intent, it has invariably provided for an explicit rule that revokes the ordinary disposition. For example, MCL 700.2803(2)(a)(*i*) provides, "The felonious and intentional killing or the conviction of the felon for the abuse, neglect, or exploitation of the decedent . . . [r]evokes . . . [a] [d]isposition or appointment of property made by the decedent to the killer or felon in a governing instrument." See also MCL 700.2807(1)(a)(*i*) ("Except as provided by the express terms of a governing instrument, court order, or contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage . . . [r]evokes . . . [a] disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument . . . ."). EPIC provides no such rule for circumstances in which an attorney has drafted a will or trust in his or her own favor, and it would be improper for this Court to adopt such a substantive

rule on its own initiative. *Paselli v Utley*, 286 Mich 638, 643; 282 NW 849 (1938) ("This court cannot write into the statutes provisions that the legislature has not seen fit to enact.").

For these reasons, we conclude that a per se rule of undue influence is untenable and incompatible with the longstanding policies of this state, and it would be inappropriate for this Court sua sponte to adopt such a rule.

D. MRPC 1.8

Despite the clear statutory requirements and fundamental concepts of probate law in Michigan, appellants contend that the later adoption of MRPC 1.8(c) favors the implementation of the per se rule. Once again, MRPC 1.8(c) states, "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." There are several reasons why the adoption of this rule does not warrant a change in current law or the overruling of our longstanding precedents in regard to the present controversy.

First, MRPC 1.8(c) became effective in 1988, which antedated *Powers* but predated the Legislature's decision to codify the requirements in EPIC that a contestant establish undue influence and that the burden of persuasion remain always with the contestant. That is, our Legislature chose to codify the requirements in EPIC *despite* the fact that MRPC 1.8(c) already was in place and provided that "[a] lawyer shall not prepare an instrument giving the lawyer . . . any substantial gift from a client . . . ." Therefore, even if it could be explained how the MRPC could alter substantive

law—which it cannot for the reasons that follow—the earlier adoption of MRPC 1.8(c) would have no effect on EPIC's later-adopted requirements.

Second, MRPC 1.8(c) does not create a basis for voiding a will or trust. Rather, MRPC 1.8(c) merely prohibits a lawyer from preparing "an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client . . . ." The rule is silent concerning what effect, if any, a breach of the rule has upon the will or trust. This silence is filled by the nonsilence of MRPC 1.0(b), which relevantly provides:

> *Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process*. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law. [Emphasis added.]

In addition to the text itself of MRPC 1.0(b), this provision includes a comment setting forth the fundamental scope of the MRPC, and this comment further asserts that a breach of the MRPC merely constitutes a basis for "invoking the *disciplinary* process." The comment states:

> [A] failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. . . .
>
> As also indicated earlier in this comment, a violation of a rule does not give rise to a cause of action, nor does it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be

> a basis for civil liability. Furthermore, the purposes of the rules can be subverted when they are invoked by opposing parties as procedural weapons. *The fact that a rule is a just basis . . . for sanctioning a lawyer under the administration of a disciplinary authority does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty*. [Emphasis added; comma omitted.]

Thus, as limned in the text of MRPC 1.0 and further explained in its accompanying comment, the remedy for a breach of MRPC 1.8(c) is the "disciplinary process." Breaches of the MRPC just do not give rise to causes of action, and private parties cannot seek to enforce a disciplinary rule. Because MRPC 1.8(c) specifically is silent as to the effect of its breach, and because a breach of the MRPC generally only supplies a basis for invoking the attorney disciplinary process, MRPC 1.8(c) does not bear on the validity of *Powers* or on the resolution of this case.

Third, our caselaw also supports this conclusion by holding that standards of professional conduct do not create or modify substantive law. In *People v Green*, 405 Mich 273, 282; 274 NW2d 448 (1979) (opinion by COLEMAN, C.J.), we considered whether a breach of the Code of Professional Responsibility could compel a particular ruling on substantive law.[10] The prosecutor in *Green* had breached disciplinary rule (DR) 7-104(A)(1), which provided that " 'a lawyer shall not . . . [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter

[10] The Code of Professional Responsibility preceded the adoption of the MRPC.

unless he has the prior consent of the lawyer representing such other party . . . .' " *Id*. at 282-283, quoting DR 7-104(A)(1). The prosecutor interviewed the defendant alone after he had waived his *Miranda*[11] rights and stated that he wished to speak with the prosecutor without his lawyer present. *Id*. at 287. The defendant then offered statements that were later used as incriminating evidence at his trial. *Id*. at 287-288. Defense counsel moved to suppress these statements in part on the ground that the prosecutor had breached DR 7-104(A)(1), but the trial court denied the motion. *Id*. On appeal, a majority of this Court held that, although the prosecutor had breached a rule of professional conduct stating that he "shall not" engage in such conduct, his breach did not afford a basis for suppression of the evidence obtained.[12] *Id*. at 293-297. Instead, the lead opinion summarized the difference between the Code of Professional Responsibility and substantive law:

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[11] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[12] Chief Justice COLEMAN authored the lead opinion with only Justice RYAN joining the opinion in full; however, a majority agreed with its reasoning that a breach of the code did not bear on the admissibility of evidence. The Chief Justice ultimately concluded that the exclusionary rule did not apply and rejected the notion that a breach of the code affected substantive law. Justice WILLIAMS, joined by Justice FITZGERALD, wrote separately, agreeing with the lead opinion "that the prophylactic exclusionary rule need not, and should not, be extended to cover this case." *Id*. at 296 (WILLIAMS, J., concurring in part and dissenting in part). They further agreed that a breach of the code did not compel the exclusion of the evidence. Justice WILLIAMS and Justice FITZGERALD noted that courts could refer attorneys to the bar for disciplinary action to deter wrongful conduct and thus dissented in part because they would have "order[ed] the Clerk to report the assistant prosecuting attorney's action in this matter to the grievance authorities for appropriate action." *Id*. at 297. As a result, a majority of the Court agreed that, although the prosecutor had breached a standard of professional conduct that prohibited him from engaging in certain conduct, the breach did not dictate the substantive law.

> [Defendant's] argument rests upon a basic misconception of the Code of Professional Responsibility. The provisions of the code are not constitutional or statutory rights guaranteed to individual persons. They are instead self-imposed internal regulations prescribing the standards of conduct for members of the bar. Although it is true that the principal purpose of many provisions is the protection of the public, the remedy for a violation has traditionally been internal bar disciplinary action against the offending attorney. The sanctions available are by no means trivial. The attorney faces permanent disbarment. In these respects the provisions of the code are no different from the provisions found in the codes of conduct for other professions, such as medicine or architecture. They are all self-governing, in-house regulations.
>
> The admissibility of evidence in a court of law, on the other hand, is normally determined by reference to relevant constitutional and statutory provisions, applicable court rules and pertinent common-law doctrines. Codes of professional conduct play no part in such decisions. [*Id*. at 293-294.]

Accordingly, under *Green*, a breach of a standard of professional conduct "standing alone should be dealt with by bar disciplinary action rather than" by allowing the breach to affect the substantive legal decisions of a case. *Id*. at 294.

For these reasons, a breach of the MRPC merely constitutes grounds for invoking the attorney disciplinary process. The rules of professional conduct promulgated by this Court should neither overrule nor give rise to substantive law. Therefore, the adoption of MRPC 1.8(c), which occurred before the Legislature enacted the current probate framework of this state under EPIC, has no effect on either governing law in this case or on the proper resolution of this matter. See *Green*, 405 Mich 273. See also, e.g., *In re Bloch*, 425 Pa Super 300, 310; 625 A2d 57 (1993) ("To the extent that the [attorney's] conduct is challenged as unethical

behavior violative of the Rules of Professional Conduct, Rule 1.8(c), our Supreme Court has held that enforcement of the Rules of Professional Conduct does not extend itself to allow courts to alter substantive law or to punish an attorney's misconduct.").

IV. REMAINING ISSUES

Independent of the undue-influence analysis, appellants argue that the will and the trust here should be held automatically void because their "purposes" ran contrary to "public policy." MCL 700.7404 provides that "[a] trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve." Furthermore, MCL 700.7410(1) provides that "a trust terminates to the extent . . . the purposes of the trust . . . are found by a court to be unlawful or contrary to public policy." EPIC does not contain any similar provision for wills. However, even if EPIC contained such a provision, appellants' overall argument fails because (a) it ignores the distinction between the *purpose* of a will or trust and the *manner* in which these are formed and (b) automatically invalidating a will or trust for a breach of MRPC 1.8(c) continues to give insufficient regard to the critical countervailing policy consideration: discerning and giving faithful effect to the decedent's intentions. Here, the "purposes" of the will and the trust were to bestow a gift to a friend, which in no way is at odds with public policy. Appellants fail to cite any genuine public policy that runs contrary to the purposes of *this* will and *this* trust, but instead merely take issue with the *manner* in which these instruments were formed, and thus their public-policy arguments are flawed.[13]

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[13] Although the opinion in support of reversal asserts that "there is no need to resort to public policy because our Court has long had the power

Additionally, appellants argue that MRPC 1.8(c) sets forth an "indicator" of public policy—see *Terrien*, 467 Mich at 67 n 11 ("We note that, besides constitutions, statutes, and the common law, . . . rules of professional conduct may also constitute definitive indicators of public policy.")—and therefore that a breach of MRPC 1.8(c) renders a will and trust void on public-policy grounds. At the same time, appellants fail even to mention the strong countervailing public-policy considerations regarding the decedent's intentions. Our common law and our statutes may be considered the truest indicators of public policy, see *id*. at 66-68, and that common law and those provisions of EPIC

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to establish the law of fraud," it analogizes the instant case to those in which courts have found unethical fee-splitting contracts between attorneys to be unenforceable on the basis of "public policy." Such an analogy fails to fully appreciate the distinction between contracts and wills and trusts. As the Court of Appeals usefully explained:

> In the case of a contract deemed void as against public policy because it violates the MRPC, it is principally the drafting lawyer who suffers the consequence of the invalid contract. However, when a trust or will is deemed void as against public policy because the drafting attorney violated the MRPC, the invalidation of the bequest potentially fails to honor the actual and sincere desires of the grantor. [*In re Mardigian Estate*, 312 Mich App at 564.]

In addition, as we have noted earlier, the problematic nature of the *instant* will and trust arises from the *manner* in which these two instruments were formed, not from their *purpose*. Moreover, with respect to fraud, the opinion in support of reversal does not acknowledge the longstanding principle that "[f]raud cannot be presumed, but must be proved." *Brown v Dean*, 52 Mich 267, 271; 17 NW 837 (1883). See also *Goldberg v Goldberg*, 295 Mich 380, 384; 295 NW 194 (1940) ("The burden of showing fraud is upon the person alleging it. Fraud is never presumed, nor is it to be lightly inferred.") (citations omitted). A per se rule of undue influence, however, does exactly that: it presumes the existence of fraud or, more specifically, the existence of undue influence while discharging the contestant's affirmative responsibility to establish that the decedent's free agency has been abrogated.

strongly favor the discernment and effectuation of the decedent's intentions, MCL 700.1201(b) (providing that EPIC shall be applied "[t]o discover and make effective a decedent's intent in distribution of the decedent's property"); MCL 700.8201(2)(c) (providing that the MTC shall be applied "[t]o foster certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust"); *Kremlick*, 417 Mich at 240 ("A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible.").

In summary, appellants' public-policy arguments are without merit because the "purposes" of the instruments in dispute are not contrary to public policy and because their per se approach fails entirely to consider even the most dominant countervailing public-policy considerations set forth in EPIC, namely the decedent's intentions.

V. CONCLUSION

Among the underlying purposes and policies of EPIC, reflected deeply within our state's caselaw, is the discernment and effectuation of the decedent's intentions in the distribution of his or her property. Indeed, the "guiding polar star" in probate law is that the intentions of the decedent control in this regard. The per se rule of undue influence advocated by appellants would foreclose at some juncture any further consideration of these intentions in favor of an assessment of the behavior of the decedent's attorney. Appellants' per se rule would run contrary to the foundational principles of probate law, longstanding precedents of this state, and the express provisions of EPIC that require the contestant to bear the burden of establishing

undue influence. And the adoption of MRPC 1.8(c), which occurred well before our Legislature enacted EPIC, has no effect on our conclusion in this case because a breach of the MRPC is exclusively a basis for invoking the attorney disciplinary process and does not override the substantive law of EPIC. Therefore, we respectfully reject the approach advocated by appellants, endorse the rebuttable presumption of undue influence articulated in *Powers*, and would affirm the judgment of the Court of Appeals for the reasons set forth in this opinion.

ZAHRA and CLEMENT, JJ., concurred with MARKMAN, C.J.

MCCORMACK, J. (*for reversal*). The ethical code that governs every member of the State Bar of Michigan categorically forbids a lawyer from drafting a will for a client that leaves the lawyer a substantial gift. Yet this Court's outdated precedent enables a lawyer to do so anyway. To be sure, that precedent requires the lawyer to show no undue influence was applied to his client. But that showing is required *after* the client has passed away, giving the lawyer a consequential evidentiary advantage.

The affirming opinion's decision to affirm this precedent leaves clients vulnerable, rewards unscrupulous attorneys, encourages costly litigation, and moreover does not account for the important shifts of the past half-century in our ethics rules, probate law, and evidentiary presumptions. Not all undue influence is equally pernicious: A lawyer who drafts a testamentary instrument that leaves the lawyer a substantial gift in flagrant violation of the professional code of ethics is unique among conflicted beneficiaries in will

contests, as she is both an author and beneficiary of the will. To respond, an effective tool is needed.

I would overturn *In re Powers Estate*, 375 Mich 150; 134 NW2d 148 (1965), to the extent that it held that courts should apply a mere presumption of undue influence to a will contest where an attorney has drafted a testamentary document that names himself as a beneficiary. That particular equitable remedy may have been sufficient before significant changes to our ethics code, the law of probate, and our approach to presumptions. But it is no longer sufficient to protect the public. I would therefore replace it with a per se rule of undue influence that voids substantial testamentary gifts to attorney-drafters. Those who draft wills should not benefit from them.

We owe the public better. I would reverse the Court of Appeals.

I. ANALYSIS

A. GOVERNING LAW

The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., the statutory framework that governs testamentary transfers, was enacted so that "a decedent's intent in distribution of the decedent's property" could be "discover[ed] and [made] effective[.]" MCL 700.1201(b). Thus, the "fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). The same applies to trust documents. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985). To determine the decedent's intent, we read a testamentary document as a whole and, when it contains no ambiguity, enforce it as written.

Bill & Dena Brown Trust v Garcia, 312 Mich App 684, 693-694; 880 NW2d 269 (2015).

I agree with the affirming opinion that a court must do all in its power to carry out the testator's intent. That's the whole point: when someone has potentially exerted undue influence on a decedent, courts can no longer be sure that the testamentary instrument, the end product of that alleged influence, accurately reflects the testator's intent. *In re Sprenger's Estate*, 337 Mich 514, 521-522; 60 NW2d 436 (1953); *Detroit Bank & Trust Co v Grout*, 95 Mich App 253, 274-276; 289 NW2d 898 (1980). Testamentary gifts that result from undue influence are void.[1] To establish undue influence, contestants of a testamentary document must show more than mere opportunity: they must show that the testator " 'act[ed] under such coercion, compulsion, or constraint that his own free agency is destroyed. The will or the provisions assailed does not truly proceed from him. He becomes the tutored instrument of a dominating mind . . . .' " *In re Balk's Estate*, 298 Mich 303, 309; 298 NW 779 (1941), quoting *In re Williams' Estate*, 185 Mich 97, 118; 151 NW 731 (1915) (cleaned up).

Generally, the burden of proof rests with the contestant alleging undue influence. MCL 700.3407(1)(c); *Kar v Hogan*, 399 Mich 529, 539; 251 NW2d 77 (1976); *In re Kramer's Estate*, 324 Mich 626, 634-635; 37 NW2d 564 (1949). But this Court has long applied a different

[1] EPIC provides for the invalidation of trusts produced by undue influence, see MCL 700.7406 ("A trust is void to the extent its creation was induced by fraud, duress, or undue influence."), and the same rule has been applied to wills, see *In re Anderson Estate*, 353 Mich 169, 172; 91 NW2d 356 (1958) ("Undue influence exercised upon one who makes a will may become the basis for finding the will invalid, if by reason of that influence the right of the testator to freely exercise his discretion in disposing of his property has been taken away from him.").

framework when an attorney drafts a testamentary instrument for her own benefit. In those cases, we recognized as early as 1897 that the attorney's palpable self-interest "arous[es] suspicion, and raises a presumption more or less strong that undue influence has been exerted . . . ." *Donovan v Bromley*, 113 Mich 53, 54; 71 NW 523 (1897).

Ten years later, we reiterated that it was "generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor, and this court has held that such dispositions are properly looked upon with suspicion." *Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907). The presumption of undue influence, as applied to attorney-drafter-beneficiaries, is the same presumption that applies whenever a testator favors a fiduciary. *Powers*, 375 Mich at 180-181 (opinion by SOURIS, J.). The presumption arises

> upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*Kar*, 399 Mich at 537.]

That is, the presumption is no different for an attorney-drafter-beneficiary or another fiduciary-beneficiary, despite the attorney's unique role in preparing the questionable instrument and plain ethical violation in drafting it.

We last examined this presumption against an attorney-drafter in *In re Powers*, more than half a century ago. Maybe it made sense then. For the reasons that follow, I believe it is time to reconsider it.

B. THE INSUFFICIENCY OF THE PRESUMPTION

In my view, the affirming opinion's decision today to affirm the rebuttable presumption for attorney-drafters fails the testator while protecting the lawyer. To begin, the rebuttable presumption is easily surmountable. The presumption does not change the ultimate burden of proof, which rests with the party alleging undue influence. *Id*. at 538.[2] Its function "is solely to place the burden of producing evidence on the opposing party," *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985), but the presumption "has no weight as evidence . . . and cannot be weighed against evidence," *In re Jennings' Estate*, 335 Mich 241, 244; 55 NW2d 812 (1952); see also *In re Cotcher's Estate*, 274 Mich 154, 159; 264 NW 325 (1936) (" '[B]ut, if [the presumption is] challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself.' "), quoting *Gillett v Mich United Traction Co*, 205 Mich 410, 414; 171 NW 536 (1919).

In other words, it allows the benefiting party the opportunity to satisfy the burden of persuasion to avoid a directed verdict. *Widmayer*, 422 Mich at 289. But the opposing party can rebut the presumption with "sufficient" evidence. *Kar*, 399 Mich at 542; *In re*

[2] See also MRE 301 ("In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party whom it was originally cast.").

Peterson Estate, 193 Mich App 257, 262; 483 NW2d 624 (1991).[3] Overcoming the presumption is hardly a challenge given this modern construction.

And applying the presumption against attorney-drafters (as contrasted with other beneficiary-drafters) ignores the unique status of the attorney. The *Powers* Court missed this, stating:

> Whether proponent [i.e., the attorney] used questionable professional judgment in drawing the instrument involved need not be retried; it is irrelevant. Proponent's status as a member of the bar of Michigan adds not one centimeter, nor subtracts one from his position as a party litigant, and this question should take no time in trial. [*Powers*, 375 Mich at 176.]

That's not right. The prospect of discerning testator intent when the attorney-drafter is compromised is far harder than for other compromised drafters. Evidence of testator intent is most commonly located in the testamentary document itself and the mind of the attorney who drafted it. While the first is ordinarily the best evidence of intent, *Karam v Law Offices of Ralph J Kliber*, 253 Mich App 410, 424; 655 NW2d 614 (2002), where there is a possibility that the document was the product of undue influence, it is of little use. In such a case an attorney-drafter's testimony would be the next surest evidence of intent, given that she was intimately involved with the testator in producing the instrument; indeed, when an attorney-drafter is not the beneficiary of a contested instrument, her testimony can be critical to a court trying to assess testator intent where undue influence on the part of a fiduciary is alleged. See, e.g.,

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[3] I note, however, that there is an open question on what a party must show to rebut the presumption. See, e.g., *In re Mortimore Estate*, 491 Mich 925 (2012) (YOUNG, C.J., dissenting).

Jennings' Estate, 335 Mich at 244 ("The presumption was held to have been rebutted and overcome by a showing that the will had been executed after independent legal counsel in [various cases.]"); *In re Grow's Estate*, 299 Mich 133, 140; 299 NW 836 (1941) (noting only that while a presumption might have arisen, the testator "had independent advice of Mr. Phillips, an attorney of Pontiac, in the preparation of his will").[4] But much like the corrupt instrument, an attorney-beneficiary's ethical violation and conflicted position make him not a reliable source.

The affirming opinion seems to presume that that information is easily knowable. But that's exactly the problem. It's not. If we could readily determine Mr. Mardigian's intent, there would be no need for this appeal. But it is precisely because our precedent allows attorneys to draft wills for their own benefit that difficult situations like this arise and courts must resolve matters *without* the most reliable evidence of testator intent. I don't know how the affirming opinion can be so sure what Mr. Mardigian's intent was. That's the problem unique to attorney-drafter beneficiaries.[5]

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[4] A treatise section on probate drafting recommends that attorneys "interview the prospective testator alone, or at least not in the presence of anyone who could have a possible interest in disposition of the property, as to his or her desires." 12 Mich Pleading & Practice (2d ed), § 99:48, p 466; see also *In re Hayes' Estate*, 255 Mich 338, 345; 238 NW 245 (1931) (noting, without a hint of concern, that the "will was prepared in the office of a reputable attorney after a private consultation with testator"). When the lawyer herself is the beneficiary, it is impossible for her to interview her client outside the presence of an interested party. And the threat of undue influence is heightened if the attorney-beneficiary consults the client alone. That following *best* practices would lead to *worse* outcomes signals that these instruments are inherently problematic.

[5] I emphatically reject the affirming opinion's assertion that the testator's intent does not matter to me. It is possible that application of a per se rule might defeat the testator's intent in this case; but it is also

C. PER SE UNDUE INFLUENCE RULE

Because I agree with the affirming opinion that protecting testator intent is our goal, I would adopt a per se rule of undue influence for attorney-drafters.[6] Such a rule ensures that the drafting attorney will be a reliable witness in the search for the testator's true intent. It would make it easier to determine the testator's intent; when a client wants to leave his lawyer a substantial gift, the lawyer simply will have an independent lawyer counsel the client and draft the instrument. While a rebuttable presumption might have been a sufficient equitable remedy in a different era, changes in the law and our ethics code make it not much protection at all today.

Courts have equitable powers over the settlement of an estate. MCL 700.1302 and MCL 700.1303. And they have equitable powers to address cases of fraud. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590; 702 NW2d 539 (2005). "Undue influence is a species of fraud," and the rules of fraud therefore apply to questions of undue influence. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710 n 1; 742 NW2d 399 (2007). Courts may apply equitable powers

possible that the affirming opinion's approach will have that result. But the per se rule I advocate below would end this practice, making it much easier to determine the testator's intent in future cases.

[6] The affirming opinion is concerned that a per se rule would obviate the contestant's burden to show undue influence. Not so. The contestant would have to show that the attorney violated MRPC 1.8(c), which requires showing (1) the attorney drafted the provision leaving himself a gift, (2) the gift was "substantial," and (3) the attorney and client were not related. Once these facts are established the per se rule would take over. This basic framework is no different than invalidating a will after the contestant proves it was signed upon the threat of violence. But it is true that the burden for a litigant contesting an instrument that benefits a drafting attorney would not be the same as with other fiduciary beneficiaries. As it should be.

to preserve the integrity of the judiciary as well. *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975). The *Powers* presumption was an appropriate equitable tool for its time, but it now should receive an update: a testamentary instrument produced by an attorney-beneficiary should be seen as one that has resulted from undue influence. Full stop.

Generally, to prove undue influence, " '[m]otive, opportunity, or even ability to control' " is insufficient. *In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003), quoting *Kar*, 399 Mich at 537. Instead, "affirmative evidence" must be shown. *Id*. I would hold that a lawyer who drafts testamentary instruments in violation of MRPC 1.8(c) has provided that "affirmative evidence." I reach this conclusion after careful consideration of the substantial changes in the law and in our ethics rules since *Powers*, the need to harmonize probate law and our ethics code, and the special circumstances that set attorneys apart from other fiduciaries.[7]

I don't share the affirming opinion's concerns about a per se rule. First, the idea that a per se rule would somehow usurp the role of the Legislature rests on a flawed premise; the suggestion that EPIC has somehow codified the *Powers* presumption is simply not correct. For one thing, the Legislature provided "undue influence" as a basis to invalidate a will, MCL 700.3407(1)(c), but it has not defined the term. Nowhere does it mandate a "rebuttable presumption" as the standard for assessing undue influence, whether

[7] Because I would overrule *Powers* directly and rely on our equitable authority to establish a new rule, I decline to address respondents' argument that wills and trusts can be held void as against public policy under MRPC 1.8(c).

for attorneys or anyone else. Rather, this Court invented that doctrine. *Donovan*, 113 Mich at 54.[8]

1. CHANGES TO LAW SINCE *POWERS*

Powers was decided in a different legal world. The rules of professional conduct, probate law, and our approach to rebuttable presumptions have all changed significantly since 1965. Considered together, those changes require an updated approach to our old rule if we are serious about protecting the public in this context.

a. ETHICS RULES AND THEIR ENFORCEMENT

Bear with me; this part is a bit of a slog. Over the last century or so, a sea change has occurred in how the legal profession views and operationalizes its ethics rules. When this Court first introduced the presumption of undue influence in the context of an attorney-beneficiary of an estate at the end of the nineteenth century, there was no formal code of ethics governing lawyers; only personal morality and specific statutes governed lawyer conduct. See Niehoff, *In the Shadow*

[8] And the affirming opinion's reasoning on this point cites a particularly questionable use of legislative history. It cites the EPIC Reporter's Commentary to support the proposition that MCL 700.3407 merely restated the law of burdens of proof, presumptions and all, so that any change to the *Powers* presumption risks contravening the statute. See Martin, *Estates and Protected Individuals Code with Reporters' Commentary* (ICLE, 2001), p 77. But the Reporter's Commentary—an item the Legislature never acted upon—does "not involve an act of the Legislature" and thus has "considerably diminished" use for courts. *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). Thus, the notion that EPIC has incorporated, or otherwise precludes us from revisiting, the *Powers* presumption is not borne out by the statutory text but instead relies in part on the affirming opinion's novel use of legislative history. I am not convinced.

of the Shrine: Regulation and Aspiration in the ABA Model Rules of Professional Conduct, 54 Wayne L Rev 3, 5-6 (2008); Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 Geo J Legal Ethics 205, 206 (2002) ("The early history of American legal ethics gave no indication that lawyers would one day become a highly regulated profession. For the most part, regulation was highly traditional, episodic, and reactive, and was addressed primarily to pathological extremes of lawyer behavior."). If attorney conduct was regulated, it was case by case in litigation. 1 Hazard et al, The Law of Lawyering (4th ed), § 1.08, p 1-29. And "[p]rior to the late 1800's there were no conflict of interest rules as such[.]" Flamm, Conflicts of Interest in the Practice of Law: Causes and Cures (2015), p 30.

Alabama produced the nation's first ethical code in 1887, and the ABA built upon that code when it issued the 1908 Canons of Ethics. Hazard, *Law of Lawyering* at §§ 1.09 and 1.10, pp 1-31, 1-32.[9] Even where adopted, however, the Canons did not have the force of law, and ethics opinions interpreting the Canons did not even bind the parties to the case. *Id*. at § 1.10, p 1-32. Instead, the Canons were merely aspirational and offered vague statements "set forth in courtly prose rather than in the style of black letter law, and . . . [speaking] more to matters of etiquette than legal obligation or professional duty." *Id*. So they had little in common with enforceable rules, as they were

[9] See also American Bar Association, *Final Report of the Committee on Code of Professional Ethics*, <https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-aba-annual/2015_aba_annual_wm/2p_1_1908_canons_of_ethics.authcheckdam.pdf> (accessed June 13, 2018) [https://perma.cc/TR8D-HFZY], which includes the 1908 Canons.

too broad and general to guide behavior meaningfully, Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 Iowa L Rev 901, 907-908 (1995),[10] and were rarely invoked, Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U Chi L Sch Roundtable 469, 485 (2001). None of the Canons specifically addressed self-interested attorney-drafters. de Furia, Jr., *Testamentary Gifts from Client to the Attorney-Draftsman: From Probate Presumption to Ethical Prohibition*, 66 Neb L Rev 695, 699 (1987).

In 1935 this Court first tried to codify the ethical responsibilities of members of the State Bar. That year the Court adopted the Canons of Professional Ethics of the American Bar Association.[11] The 32 Canons, like the ABA's 1908 Canons, were typically abstract, aspirational, and short on notice of prohibited conduct.[12] See *In the Shadow of the Shrine*, 54 Wayne L Rev at

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[10] As Justice Harlan Stone lamented, "Our canons of ethics for the most part are generalizations designed for an earlier era." Stone, *The Public Influence of the Bar*, 48 Harv L Rev 1, 10 (1934).

[11] In 1935 the Legislature passed 1935 PA 58, giving this Court the authority to create and regulate the State Bar of Michigan. Under that statute, the Court adopted the Supreme Court Rules Concerning the State Bar of Michigan and the Canons of Professional Ethics of the American Bar Association. See *Supreme Court Rules Concerning the State Bar of Michigan*, 15 Mich State B J 12, 17 (1936) ("Section 14 – Rules of Professional Conduct. The ethical standards relating to the practice of law in this state shall be the present Canons of Professional Ethics of the American Bar Association, and those which may from time to time be announced or recognized by the Supreme Court of this State."); *Canons of Professional Ethics*, 15 Mich State B J 42 (1936).

[12] Some scholars have suggested that the Canons were not "a serious effort [to] set[] a national standard for lawyer behavior; indeed, in the sense described, they were just the opposite." *In the Shadow of the Shrine*, 54 Wayne L Rev at 7. It was not until the Canons were adopted by most states, the ABA grew in membership and influence, and the ABA issued opinions to clarify the Canons that the Canons became authoritative. *Id*.

6-7. Relevant to this appeal, only Canon 11 of the Canons of Professional Ethics advised bar members on how to handle trust property.

Canon 11, the amended version of which the Court adopted in 1938, provided in full:

> Dealing with Trust Property.
>
> The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.
>
> Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.[13]

Canon 11 therefore only advised that lawyers "should refrain" from actions taking advantage of their client's confidence; it did not explicitly prohibit a lawyer from receiving a gift under a testamentary instrument the lawyer drafted. What is more, the Court adopted no detailed or functional grievance procedure.[14]

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[13] *Canons of Professional Ethics*, 17 Mich State B J 483, 486 (1938). The original version of Canon 11 in both the 1908 ABA Canons of Professional Ethics and the 1935 Michigan Canons of Professional Ethics did not contain the phrase "The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client." See *Rule 11*, *Canons of Professional Ethics*, 15 Mich State B J 42, 45 (1936). The Canon was amended by the ABA in 1933 and 1937, and this Court adopted the language in full in 1938. See American Bar Association, *ABA Canons of Professional Ethics*, <https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_migrated/Canons_Ethics.authcheckdam.pdf> (accessed on June 13, 2018) [https://perma.cc/JT2Q-TRMM].

[14] While this Court did adopt some disciplinary mechanisms in 1935 when it adopted the Supreme Court Rules for the State Bar of Michigan, it was not until 1947 that the Court clarified and expanded the grievance procedure for attorney misconduct. See Rule 15, *Supreme Court Rules Concerning the State Bar of Michigan*, 317 Mich xxxix, xlvi

Under these rules, an attorney who drafted a will to which she was a beneficiary suffered no consequences. For one example, the State Bar's Committee on Professional and Judicial Ethics issued an ethics opinion on this topic in 1948. Opinion 112, 1948, 29 Mich State Bar J 141 (1950). The attorney who was the subject of the opinion was indebted to his client and drafted the client's will discharging the attorney of all debt. *Id*. Citing our older opinions on the topic, the Committee stated that it could not "assume that the lawyer had improper motives," but "the circumstances are such as to place him in a most unfavorable light." *Id*. at 142. The Committee concluded that an attorney here could not ethically draft such a will. *Id*. at 142-143. But the upshot of the opinion was only that the Bar received some theoretical instruction on ethics; the unnamed attorney presumably remained debt-free.[15]

This was the professional-rules backdrop against which the question we decide here was last considered in *Powers*. A lot happened next.

In 1971, this Court tried to provide additional guidance to the profession by adopting parts of the Code of Professional Responsibility of the American Bar Association, issued two years earlier.[16] The ABA Code

(1947). Since 1947 this Court has repeatedly amended the Rules Concerning the State Bar of Michigan to strengthen the attorney grievance procedure. See, e.g., *Amendments to the Supreme Court Rules Concerning the State Bar of Michigan*, 343 Mich lxi, xliii (1955); *Amendments to the Supreme Court Rules Concerning the State Bar of Michigan*, 369 Mich xxxiii, xxxiv (1963).

[15] We see the same outcome in another ethics opinion, where the attorney drafted a will naming himself as executor of the estate and leaving himself a sizable fee—10 percent of the estate. Opinion 144, 1951, 57 Mich State Bar J 181 (Special Issue, 1978).

[16] See *Court Considers Modified ABA Canons and Rules for Michigan*, 50 Mich State B J 56, 56-68 (1971); see also Carty, *Money for Nothing? Have the New Michigan Rules of Professional Conduct Gone Too Far in*

contained aspirational "Ethical Considerations," one of which suggested somewhat tepidly that a lawyer should usually not accept a testamentary gift if the lawyer drafted the testamentary instrument.[17] But once again, the Ethical Considerations did not create enforceable rules.[18] And we did not adopt the Ethical Considerations but only the Canon statements and associated Disciplinary Rules. See *Code of Professional Responsibility and Canons*, 385 Mich lvi, lvi-xc (1971). Neither the Disciplinary Rules nor the Canon statements contained any rule governing a lawyer who drafts a testamentary instrument under which the lawyer takes a gift.

Liberalizing the Rules Governing Attorney's Referral Fees?, 68 U Det L Rev 229, 234 (1991). The ABA Model Code of Professional Responsibility was adopted by the ABA in 1969.

[17] This Ethical Consideration stated:

> A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client. [Ethical Consideration 5-5, American Bar Association, *ABA Model Code of Professional Responsibility,* <https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/mod_code_prof_resp.authcheckdam.pdf (accessed June 13, 2018) [https://perma.cc/8YQY-TQ5R]].

[18] See *In the Shadow of the Shrine*, 54 Wayne L Rev at 8 (noting the Ethical Considerations' aspirational nature); ABA Comm on Evaluation of Prof Standards, *Report to the House of Delegates* (January, 1982), p 2 ("As explained in the [Model] Code Preamble, it was the intent of the Wright Committee [which drafted the Code] that the Code's Canons and Ethical Considerations be and remain unenforceable."), available at <https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_2-82.authcheckdam.pdf> (accessed June 13, 2018) [https://perma.cc/SMKX-RLXM].

Things changed in an important way with the ABA's Model Rules of Professional Responsibility in 1983. Professor Geoffrey Hazard, Jr., the reporter for the ABA commission that produced the Model Rules, stated that the ethical rules should establish " 'the lawyer's legal obligations and not [be] expressions of hope as to what a lawyer ought to do.' " Peters, Note, *The Model Rules as a Guide for Legal Malpractice*, 6 Geo J Legal Ethics 609, 611 (1993), quoting Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 Clev St L Rev 571, 574 (1982). In other words, the rules should have some teeth.[19] See generally Painter, *Rules Lawyers Play By*, 76 NYU L Rev 665, 668 (2001) ("The evolution of professional responsibility rules in the last century reveals several important trends. First, codes have migrated away from broad standards and toward clearly defined rules."). That view was reflected in the report of the ABA commission that drafted the Rules. The commission's "objective . . . was to produce rules of professional conduct that preserve fundamental values while providing realistic, useful guidance for lawyer conduct in an environment that finds the profession and the practice of law, like American society itself, undergoing significant change." ABA Comm on Evaluation of Prof Standards, *Report to the House of Delegates* (June 30, 1982), p 1.[20]

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[19] As Professor Hazard noted, the "Model Rules were set forth in the manner of a true code—mandatory conduct rules, without the 'softening' addition of hortatory provisions that were meant to inspire rather than command." Hazard, *Law of Lawyering* at § 1.12, p 1-35.

[20] This report is available at <https://americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_8-82.authcheckdam.pdf> (accessed June 13, 2018) [https://perma.cc/V4XW-7TZ4]. See also *id*. at 2 ("But filling in gaps in the 1969 Code was only part of the assignment. Experience has shown that the Code, in many cases, is difficult to interpret and apply. There is a need for standards that are more understandable and more readily useful to lawyers in

The report also noted that the then-effective Model Code left many "gaps in what should be a comprehensive statement of professional standards." *Id*. A lawyer who consults the ethical rules, the committee observed, should have "reliable guidance as well as fair warning and fair limitation." ABA Comm on Evaluation of Prof Standards, *Report to the House of Delegates* (January, 1982), p 4.

The Rules, then, were meant to eliminate flimsy aspirational ideals and draw (at least some) clear lines. *In the Shadow of the Shrine*, 54 Wayne L Rev at 10.[21] And, relevant here, Model Rule 1.8(c) prohibited an attorney from drafting a testamentary document leaving herself a substantial gift. To be sure, this general approach of mandatory rules marked a fundamental change. See generally Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 Notre Dame L Rev 223, 223 (1993) ("Over time, the professional codes governing lawyer behavior have become statutory in form. Modern codes increasingly tell lawyers how they must act."); Hazard, *The Future of Legal Ethics*, 100 Yale L J 1239, 1241 (1991) ("[The ethical] norms have become 'legalized.' The rules of ethics have ceased to be internal to the profession; they have instead become a code of public law . . . .").

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everyday practice. The bar is serious about self-regulation and enforcement of its standards. But it must be recognized that enforcement will not be achieved primarily through disciplinary agencies. Like any other body of law, the law of lawyering depends on self-enforcement and widespread voluntary compliance if its ends are to be met. And the achievement of voluntary compliance depends, in turn, on the existence of clear, workable rules.").

[21] Proponents of the change in Michigan, including the State Bar, argued that the Model Rules provided clear guidance in the form of mandatory law familiar to practitioners. See ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports (Feb 22, 1984), pp 70-71.

In 1988, this Court adopted Model Rule 1.8(c), along with many others, when it promulgated the current version of the Michigan Rules of Professional Conduct (MRPC).[22] For the first time, Michigan's professional rules specifically addressed a lawyer's obligations when preparing a testamentary gift:

> A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.[23]

We have not amended MRPC 1.8(c) since its adoption.

The affirming opinion today gives these changes short shrift: these important changes in the rules governing lawyers, and specifically MRPC 1.8(c), should force us to rethink the *Powers* presumption.

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[22] The ABA adopted the Model Rules of Professional Conduct in 1983. This Court did not adopt the Model Rules in full, instead making several modifications. See MRPC 1.10; compare Model Rules of Professional Conduct, Rule 1.10; see MRPC 3.6; compare Model Rules of Professional Conduct, Rule 3.6. At the time, ABA Model Rule of Professional Conduct, Rule 1.8(c) mirrored MRPC 1.8(c). See American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005* (Chicago: American Bar Association, 2006), p 184. In 2002, the ABA amended Model Rule 1.8(c). *Id.* at pp 197-211. Rule 1.8(c) of the Model Rules of Professional Conduct now provides in full:

> A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

This Court has yet to adopt these amendments.

[23] MRPC 1.8 governs "Prohibited Transactions."

Ethical principles have always undergirded suspicions about testamentary gifts to an attorney-drafter. See *Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907).[24] When the governing ethics principle was a squishy recommendation, a rebuttable presumption was an appropriate equitable response. When Dr. Lunette Powers' attorney drafted his client's will to leave a substantial gift to the attorney's wife, he violated no clear ethical rule, as there was none.

But attorney Papazian drafted his client's will and trust in clear violation of MRPC 1.8(c). His transgression is simply of a different kind and scope than that of Dr. Powers' attorney. And that difference means the *Powers* presumption should no longer be the appropriate equitable tool for determining undue influence. The resulting will or trust is the fruit of the ethical transgression. And so, when an attorney seeks to enforce his or her ethically prohibited work product, a court is put in the position of essentially aiding the swindle. See *Succession of Cloud*, 530 So 2d 1146, 1150 (La, 1988) ("When an attorney enters into a contract with his client in direct and flagrant violation of a disciplinary rule and a subsequent civil action raises the issue of enforcement (or annulment) of the contract, this court, in order to preserve the integrity of its inherent judicial power, should prohibit the enforcement of the contract which directly contravenes the Code adopted by this court to regulate the practice of law.").

In a closely related context, we have declined to allow courts to be conscripted into unethical enter-

[24] This Court has been bemoaning such gifts since the *fin de siècle*. *Donovan*, 113 Mich 53. And thousands of years before that, going as far back as ancient Rome, these sorts of instruments have been forbidden. *Testamentary Gifts from Client to the Attorney-Draftsman*, 66 Neb L Rev at 697.

prises. Indeed, we have endorsed the view that it is nonsensical for courts to uphold unethical fee agreements when those agreements will subject the attorney to discipline for violating our professional rules. See *Abrams v Susan Feldstein, PC*, 456 Mich 867 (1997) (reversing and agreeing with the Court of Appeals dissent). The Court of Appeals has followed suit. See, e.g., *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002) (quoting Judge GRIFFIN's dissent in *Abrams* for the proposition that it would be " 'absurd' " to allow an attorney to enforce a fee agreement forbidden under our ethics rules); *Speicher v Columbia Twp Bd of Election Comm'rs*, 299 Mich App 86, 91-93; 832 NW2d 392 (2012) (noting that "courts have the authority and obligation to take affirmative action to enforce the ethical standards set forth by the Michigan Rules of Professional Conduct" and therefore refusing to enforce a contract violating the ethical rules).[25] The same principles should require courts to strike down testamentary gifts to an attorney-drafter.

b. OTHER RELEVANT CHANGES IN THE LAW

Not surprisingly, change has also come to our probate laws in the 60-plus years since we decided *Powers*. Indeed, the entire legal system governing probate has gone through two series of significant changes that

[25] These cases were resolved because the ethical rules were public policy and the agreements were void for violating that policy. See, e.g., *Evans & Luptak, PLC*, 251 Mich App at 189 ("We hold that the alleged contract is unethical because it violates the Michigan Rules of Professional Conduct (MRPC). Furthermore, we hold that unethical contracts violate our public policy and therefore are unenforceable."). In the present context, by contrast, there is no need to resort to public policy because our Court has long had the power to establish the law of fraud, as explained above. So I would not lend the rule itself substantive effect, nor must I look to it here as the definitive expression of public policy.

introduced and modified an informal probate procedure. The affirming opinion does not address these changes at all, but I find them critical. In 1978, the Legislature developed "independent" probate as an alternative to supervised probate. 1978 PA 642, art 1, § 7 (codified at 1979 CL 700.7). Independent probate favored less court supervision than supervised probate—the approach in place at the time of *Powers*. *Id*. (defining "independent probate" as "probate designed to operate without unnecessary intervention by the probate court as provided in article 3"); Foster & Zack, *Informal Estate Proceedings in Michigan* (2000), p 1-1 (noting that "the probate register," and not the court, "made decisions and signed documents throughout independent proceedings from commencement to the certificate of completion"). This alternative was retained, with modifications, as "informal" probate in our present system, EPIC, 1998 PA 386, § 3301 (codified at MCL 700.3301). Informal proceedings are the process "for probate of a will or appointment of a personal representative conducted by the probate register without notice to interested persons." MCL 700.1105(b); see also MCL 700.3301 (describing procedures for informal probate).[26] Formal proceedings, by contrast, take place before a judge and require notice to interested persons. MCL 700.1104(h). These changes created and normalized probate processes with diminished judicial involvement and oversight.

In addition to the changes to probate law, our approach to rebuttable presumptions in the broader civil context has changed. A few months before we

[26] These alternative procedures appear to be widely used. Shortly before EPIC was passed, more than 70 percent of estates began in independent administration. Foster & Zack, p 1-2. The trend away from formal probate continued after EPIC took effect. *Id*.

decided *Powers*, we held that a rebuttable presumption itself could sometimes be weighed as evidence. *In re Wood Estate*, 374 Mich 278, 294; 132 NW2d 35 (1965). A jury had to be instructed to apply a presumption unless it was rebutted. In other words, under this view "the presumption is 'evidence,' to be weighed and considered with the testimony in the case." 2 McCormick, Evidence (7th ed), § 344, p 699. This gave the presumption greater effect and turned it into a "burden shifting device: Once the presumption was established, the burden shifted to the opponent to establish that the presumed fact was not true. Moreover, even if rebutted, the presumption was to be presented to the jury as a conditional mandatory inference." 1 Mich Court Rules Practice, *Evidence* (3d ed), § 301.2, p 171.

But in *Widmayer v Leonard*, we rejected this approach to presumptions and established the weaker presumption rule discussed above. *Widmayer*, 422 Mich at 289. Thus, the presumption no longer has evidentiary weight and can be rebutted by "sufficient" evidence. *Bill & Dena Brown Trust*, 312 Mich App at 701. When it is, the presumption drops out of the case and does not shift the burden of persuasion. 2 McCormick, § 344, p 692 ("[T]he only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If that evidence is produced by the adversary, the presumption is spent and disappears."); 1 Mich Court Rules Practice, § 301.2, p 172 ("Presumptions do not shift the burden of persuasion."). Presumptions under this approach have thus been described as "not very significant at all." Benson, *Michigan Rule of Evidence 301, I Presume*, 87 Mich B J 34, 36 (Aug 2008); see also 2 McCormick § 344, p 694 (noting that this approach is criticized for "giving to presumptions an effect that is too 'slight and evanescent' ") (citation

omitted). In other words, the work that the presumption could be counted on to do when *Powers* was decided is diminished considerably.

The combination of these changes is a boon to the unethical lawyer. The probate system is easier to navigate without court involvement. And decreased judicial oversight means it is less likely that unscrupulous lawyers are found out; it is easier for them to escape with their testamentary boodle. And if they are questioned, the rebuttable presumption of yesterday is a far lower hurdle to clear for today's lawyers than it was in 1965 for Dr. Powers' lawyer. The affirming opinion does not explain why a court-fashioned rule that made sense before these changes still makes sense.

2. ADVANTAGES OF A PER SE UNDUE INFLUENCE RULE

In my view these changes in the law underscore why attorney-beneficiary instruments should be prohibited. A per se rule would harmonize probate law and MRPC 1.8(c) and get courts out of both the difficult business of struggling to discern testator intent when the primary sources are unreliable and the distasteful business of approving attorneys' ethical workarounds.[27]

Harmonizing these rules is also efficient. A rebuttable presumption forces the parties into a messy

[27] A per se rule would not, however, overwhelm the ordinary rule that undue influence may be rebutted, for attorneys are unique among fiduciaries in many ways. First, only lawyers are bound by MRPC 1.8(c). Second, lawyers are an indispensable part of the will-drafting process and routinely relied on by courts to be neutral witnesses about a client's intent. E.g. *In re Teller's Estate*, 288 Mich 193, 199; 284 NW 696 (1939), overruled in part on other grounds by *Wood Estate*, 374 Mich 278. And third, because of their legal training and intimate relationship with the client, they are well poised to exert undue influence. See *In re Henderson*, 80 NY2d 388, 394; 605 NE2d 323 (1992).

undue-influence battle in probate court. Inefficiencies multiply when a party aggrieved by the lawyer's misconduct seeks restitution in a parallel grievance proceeding. The result is nasty, poor, brutish, and long. This case illustrates the point: litigation has been ongoing since February 2012, roughly one dozen law firms have been involved so far, and its documentary record fills five-and-a-half boxes and spans many thousands of pages.[28] Although the parties dispute whether Mardigian intended to leave his estate to his family or his attorney, surely he did not intend to create that acrimony. But acrimony is inevitable given the current conflicting rules. And so contests become Dickensian parody.[29]

The framers of Rule 1.8(c) presaged this concern. During debates, the ABA voted down a proposal by the New York Bar to make Rule 1.8(c) a flexible rule by amending it to state that a lawyer "ordinarily" should not draft such instruments. ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005*, p 187. The ABA instead doubled down, making the Rule unwaivable by clients, unlike many other rules, and by providing that the conflict of interest it creates is imputed to all members of a lawyer's firm. See Hazard, *Law of*

[28] See too *Powers*, when the Court lamented how the case had consumed "8-weeks' trial, an infinity of time in legal research and briefing, a prodigal amount of money, and the expenditure of sorely needed judicial time." *Powers*, 375 Mich at 176.

[29] Cf. Dickens, *Bleak House* (London: Bradbury & Evans, 1853), p 3 ("This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. . . . Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. . . . The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world.").

Lawyering at § 13.14, p 13-32. The reason for these exacting prophylactic rules was to "reduce even the possibility of later recriminations or a later will contest that could frustrate the client's intentions." *Id*.

A per se rule of undue influence would accomplish the same goals. And it would restore some dignity to the oft-maligned legal profession. Instead the affirming opinion says on the one hand that a lawyer is prohibited from preparing a testamentary instrument that leaves a substantial gift to herself and then permits its enforcement when the corrupt instrument is challenged. I am deeply troubled that the opinion leaves in place a rebuttable-presumption regime that provides a roadmap for unethical attorneys.

II. CONCLUSION

Over a century ago this Court recognized that an attorney who drafts a client's will leaving himself a substantial gift presented a special problem for a court whose job it is to protect the testator's intent. In my view, changes in the law and in the rules governing the conduct of lawyers make the historical remedy this Court adopted to handle this problem—a rebuttable presumption of undue influence—no longer sufficient to protect the public. Yes, lawyers who violate their ethical duties to clients can be punished in the disciplinary process. But that only solves part of the problem. Because I agree with the affirming opinion that testator intent is paramount, I would update our equitable remedy to ensure that intent is respected. Our equitable remedy can and should reflect the updates to the relevant substantive law and ethics rules.

In not doing so, the Court protects compromised lawyers over the public. I would have reversed the Court of Appeals.

VIVIANO and BERNSTEIN, JJ., concurred with MCCORMACK, J.

WILDER, J., took no part in the decision of this case because he was on the Court of Appeals panel.

PEOPLE v KENNEDY

Docket No. 154445. Argued on application for leave to appeal December 6, 2017. Decided June 29, 2018.

Johnny R. Kennedy was convicted following a jury trial in the Wayne Circuit Court, Craig S. Strong, J., of first-degree premeditated murder. In November 1993, the body of Tanya Harris was discovered in an abandoned building in Detroit. The cause of death was strangulation. Attempts to find Harris's murderer stalled for nearly two decades until 2011, when various swabs taken from Harris's body were tested. The swab from Harris's left fingernail included a mixture of DNA profiles—from Harris and three male donors. Defendant's DNA profile matched the major donor's. Vaginal and rectal swabs taken from Harris also matched defendant's DNA profile. By this time, defendant was already incarcerated for having admitted to strangling another woman in 1996 under similar circumstances. Defendant was charged with Harris's murder, and defense counsel requested the appointment of Brian Zubel as a DNA expert to help understand the evidence, although counsel did not expect Zubel would testify at trial. The court denied defendant's request, and defendant was convicted. Defendant appealed, arguing that the trial court's denial of his motion to appoint an expert violated his constitutional right to present a defense. In an unpublished per curiam opinion issued July 26, 2016, the Court of Appeals, MURRAY, P.J., and RIORDAN, J. (STEPHENS, J., dissenting), affirmed defendant's conviction and found no abuse of discretion or constitutional error in the trial court's denial of defendant's request for an expert. The majority noted that defendant did not provide enough evidence that an expert would have aided the defense, as required by MCL 775.15 and *People v Tanner*, 469 Mich 437 (2003), nor did defendant raise any specific concerns with the evidence. The dissent concluded that the trial court's refusal to appoint an expert violated defendant's due-process rights because defendant could not know the inherent concerns with the DNA evidence without an expert's assistance. Defendant sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 500 Mich 978 (2017).

In a unanimous opinion by Justice VIVIANO, the Supreme Court, in lieu of granting leave to appeal, *held*:

The due-process analysis set forth in *Ake v Oklahoma*, 470 US 68 (1985), governs the issue whether a criminal defendant is entitled to the appointment of an expert witness at government expense; because MCL 775.15 does not encompass requests by an indigent criminal defendant for the appointment of an expert at government expense, *People v Jacobsen*, 448 Mich 639 (1995), and *People v Tanner*, 469 Mich 437 (2003), were overruled to the extent that they held or suggested to the contrary; the reasonable-probability standard set forth in *Moore v Kemp*, 809 F2d 702 (CA 11, 1987), is the appropriate standard for courts to apply in determining whether an indigent criminal defendant has made a sufficient showing to be entitled to expert assistance at government expense under *Ake*'s due-process analysis.

1. In *Ake*, the United States Supreme Court set forth the due-process analysis that a court must follow when an indigent criminal defendant claims he or she has not been provided the basic tools of an adequate defense and therefore has not been given an adequate opportunity to present his or her claims fairly within the adversarial system. *Ake*'s due-process analysis considers: (1) the private interest that will be affected by the action of the state, (2) the governmental interest that will be affected if the safeguard is to be provided, and (3) the probable value of the additional or substitute procedural safeguards that are sought and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. *Ake* applied this analysis in the context of a request for the assistance of a psychiatric expert in order to present an insanity defense and held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense. However, *Ake*'s due-process analysis is not limited to psychiatric experts or capital cases. Accordingly, *Ake*'s due-process analysis governs the issue whether a criminal defendant is entitled to the appointment of an expert witness at government expense.

2. MCL 775.15, which provides a means for subpoenaing certain witnesses and for paying their cost of attending trial, does not, by its express terms, provide for the appointment of expert witnesses. Moreover, MCL 775.15 falls short of the constitutional standard set forth in *Ake*, which clearly requires

the assistance of an expert in conducting an appropriate examination and in the evaluation, preparation, and presentation of the defense. However, *Jacobsen* and *Tanner* relied on MCL 775.15 to hold that a defendant must show a nexus between the facts of the case and the need for an expert and that without an indication that expert testimony would likely benefit the defense, it was not error to deny without prejudice the motion for appointment of an expert witness. While both *Jacobsen* and *Tanner* applied MCL 775.15, neither opinion specifically addressed whether that statute was applicable to requests by an indigent defendant for the appointment of an expert. Additionally, neither opinion cited *Ake* or applied its due-process framework in determining whether a trial court should grant a request by an indigent criminal defendant for the appointment of an expert witness, nor did either opinion attempt to distinguish *Ake*. Because the Legislature did not intend MCL 775.15 to encompass requests by an indigent criminal defendant for the appointment of an expert at government expense, *Jacobsen* and *Tanner* were overruled to the extent that they held or suggested to the contrary. Therefore, the Court of Appeals erred by analyzing defendant's request for expert assistance under MCL 775.15 instead of *Ake*.

3. In *Moore*, the United States Court of Appeals for the Eleventh Circuit set forth a reasonable-probability standard for determining whether an indigent criminal defendant is entitled to the appointment of an expert at government expense under *Ake*'s due-process analysis. *Moore*'s reasonable-probability standard requires a defendant to show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. The standard articulated in *Moore* strikes the right balance between requiring too much or too little of a defendant seeking the appointment of an expert under *Ake* and therefore was adopted as the appropriate standard for Michigan courts to apply. Accordingly, in order to obtain an expert at government expense under *Ake*'s due-process analysis, a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.

Court of Appeals opinion vacated; case remanded to the Court of Appeals for application of *Ake*'s due-process analysis and *Moore*'s reasonable-probability standard.

1. CRIMINAL LAW — INDIGENT DEFENDANTS — APPOINTMENT OF AN EXPERT WITNESS AT GOVERNMENT EXPENSE — *AKE*'S DUE-PROCESS ANALYSIS.

   Ake v Oklahoma, 470 US 68 (1985), sets forth the due-process analysis that a court must follow when an indigent criminal defendant claims he or she has not been provided the basic tools of an adequate defense and therefore has not been given an adequate opportunity to present his or her claims fairly within the adversarial system; *Ake*'s due-process analysis considers: (1) the private interest that will be affected by the action of the state, (2) the governmental interest that will be affected if the safeguard is to be provided, and (3) the probable value of the additional or substitute procedural safeguards that are sought and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided; *Ake*'s due-process analysis governs the issue whether a criminal defendant is entitled to the appointment of an expert witness at government expense.

2. CRIMINAL LAW — INDIGENT DEFENDANTS — APPOINTMENT OF AN EXPERT WITNESS AT GOVERNMENT EXPENSE — MCL 775.15 DOES NOT GOVERN THE APPOINTMENT OF EXPERT WITNESSES.

   MCL 775.15, which provides a means for subpoenaing certain witnesses and for paying their cost of attending trial, does not encompass requests by an indigent criminal defendant for the appointment of an expert at government expense.

3. CRIMINAL LAW — INDIGENT DEFENDANTS — APPOINTMENT OF AN EXPERT WITNESS AT GOVERNMENT EXPENSE — *MOORE*'S REASONABLE-PROBABILITY STANDARD.

   Moore v Kemp, 809 F2d 702 (CA 11, 1987), set forth a reasonable-probability standard for determining whether an indigent criminal defendant is entitled to the appointment of an expert at government expense under the due-process analysis set forth in *Ake v Oklahoma*, 470 US 68 (1985); *Moore*'s reasonable-probability standard is the appropriate standard for Michigan courts to apply in determining whether an indigent criminal defendant has made a sufficient showing to be entitled to expert assistance at government expense under *Ake*'s due-process analysis; accordingly, in order to obtain an expert at government expense under *Ake*'s due-process analysis, a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting

Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Timothy A. Baughman*, Special Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Erin Van Campen* and *Jacqueline J. McCann*) for defendant.

Amici Curiae:

Michigan Innocence Clinic (by *Imran J. Syed*, *David A. Moran*, and *Rebecca L. Hahn*) for Shawn Brown, Terry Ceasor, Juwan Deering, Milton Lemons, and Karl Vinson.

VIVIANO, J. In this case, defendant claims that the trial court violated his constitutional right to present a defense when it denied his request to appoint a DNA expert. The Court of Appeals disagreed, holding that the trial court did not abuse its discretion when it determined that defendant failed to show that expert testimony would benefit his defense, as required by MCL 775.15 and *People v Tanner*.[1] We take this opportunity to clarify that MCL 775.15 does not apply in this context; instead, we hold—as we must—that *Ake v Oklahoma*[2] is the controlling law. And, to assist trial courts in determining whether a defendant has made a sufficient showing to be entitled to expert assistance under *Ake*, we adopt the reasonable probability standard from *Moore v Kemp*.[3]

Accordingly, in lieu of granting leave to appeal, we vacate the Court of Appeals' decision and remand to that Court for further proceedings.

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[1] *People v Tanner*, 469 Mich 437; 671 NW2d 728 (2003).

[2] *Ake v Oklahoma*, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985).

[3] *Moore v Kemp*, 809 F2d 702 (CA 11, 1987).

I. FACTS AND PROCEDURAL HISTORY

In November 1993, the body of Tanya Harris was discovered in an abandoned building in Detroit. The cause of death was strangulation. Attempts to find Harris's murderer stalled for nearly two decades until 2011, when various swabs taken from Harris's body were tested. The swab from Harris's left fingernail included a mixture of DNA profiles—from Harris and three male donors. Defendant's DNA profile matched the major donor's. Vaginal and rectal swabs taken from Harris also matched defendant's DNA profile. By this time, defendant was already incarcerated for having admitted to strangling another woman in 1996 under similar circumstances.

Defendant was charged with Harris's murder. Defense counsel requested the appointment of Brian Zubel as a DNA expert to help understand the evidence, although counsel did not expect Zubel would testify at trial. Specifically, defense counsel noted that the DNA evidence "poses an especially technical and complex range of issues for defense counsel, as the essence of the prosecutions' [sic] case is the presentation of a report from a qualified technician or scientist." In order to provide effective assistance and

> zealously confront the witnesses and evidence called in the prosecution's case in chief, [defense counsel] must be educated . . . in the science and accepted protocols of DNA extraction, preservation, testing, as well as the dangers of contamination and the steps and measures taken to document a particular test, and to maintain the proper calibration of testing equipment.

The court denied defendant's request, stating: "I'm not going to appoint him for that. You can talk to him[;] you can read up on him and go to the

conference which all the rest of us have done that[.]"[4]

A jury ultimately convicted defendant of first-degree premeditated murder. Defendant appealed, arguing that the trial court's denial of his motion to appoint an expert violated his constitutional right to present a defense. The Court of Appeals, in a split decision, affirmed his conviction and found no abuse of discretion or constitutional error in the trial court's denial of defendant's request for an expert.[5] The majority noted that defendant did not provide enough evidence that an expert would have aided the defense, nor did defendant raise any specific concerns with the evidence.[6] In dissent, Judge STEPHENS argued that the majority's analysis "begs the question of why defendant would need an expert" because "defendant does not know the inherent concerns with DNA evidence or all the ways in which it may be flawed without an expert to bring those issues to light."[7] Thus, the dissent concluded that the trial court's refusal to appoint an expert violated defendant's due process rights.[8]

This Court ordered oral argument on the application, directing the parties to file supplemental briefing "addressing whether the trial court abused its discretion under MCL 775.15 and/or violated the defendant's

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[4] A few days before oral argument in this Court, the parties filed a stipulation to expand the record in which defense counsel averred that he sought out, at personal expense, Mr. Zubel and obtained some limited expert assistance regarding the DNA evidence presented in this case. On remand, the parties may argue the effect of this stipulation on defendant's claim that the trial court's denial of his motion for the appointment of an expert violated his constitutional right to present a defense.

[5] *People v Kennedy*, unpublished per curiam opinion of the Court of Appeals, issued July 26, 2016 (Docket No. 323741), p 8.

[6] *Id*. at 7.

[7] *Id*. (STEPHENS, J., dissenting) at 2.

[8] *Id*. at 1.

constitutional right to present a defense when it denied his request to appoint a DNA expert."[9]

II. STANDARD OF REVIEW

This Court reviews de novo a question of constitutional law.[10] The interpretation and application of statutes present questions of law that are also reviewed de novo.[11]

III. ANALYSIS

We must first determine what law applies to defendant's claim that the trial court violated his due process rights when it denied his request for the appointment of a DNA expert. Then we consider what showing defendant must make to be entitled to the appointment of the expert.

A. *AKE v OKLAHOMA*: THE DUE PROCESS RIGHT TO THE BASIC TOOLS OF AN ADEQUATE DEFENSE

In *Ake v Oklahoma*,[12] the Supreme Court addressed "whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question."[13] The Court began its analysis with an overview of the law in this area:

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[9] *People v Kennedy*, 500 Mich 978 (2017).

[10] *People v Smith*, 498 Mich 466, 475; 870 NW2d 299 (2015) ("A due process violation presents a constitutional question that this Court reviews de novo.").

[11] *People v Zajaczkowski*, 493 Mich 6, 12; 825 NW2d 554 (2012).

[12] *Ake*, 470 US 68.

[13] *Id*. at 70.

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.[14]

After reviewing several of its precedents affording various rights to indigent criminal defendants, the Court observed that

> [m]eaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversarial system. To implement this principle, we have focused on identifying the basic tools of an adequate defense or appeal, and we have required that such tools be provided to those defendants who cannot afford to pay for them.[15]

Turning to the issue presented—i.e., "whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to

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[14] *Id*. at 76.

[15] *Id*. at 77 (quotation marks and citations omitted).

require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense"[16]—the Court considered the three-factor due process test set forth in *Mathews v Eldridge*[17]: (1) "the private interest that will be affected by the action of the State," (2) "the governmental interest that will be affected if the safeguard is to be provided," and (3) "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided."[18]

The Court made quick work of the first two factors. In relation to the first, it observed that "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."[19] Thus, the Court concluded that "[t]he interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis."[20] Next, considering the interest of the state, the Court noted that it was unpersuaded by Oklahoma's argument that providing Ake with psychiatric assistance would result in a staggering financial burden to the state.[21] The Court then observed that "it is difficult to identify any [other] interest of the State . . . that weighs against recognition of this right,"[22] and the Court explained that

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[16] *Id*.

[17] *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).

[18] *Ake*, 470 US at 77.

[19] *Id*. at 78.

[20] *Id*.

[21] *Id*.

[22] *Id*. at 79.

> [t]he State's interest in prevailing at trial—unlike that of a private litigant—is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.[23]

Thus, the Court concluded that "the governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the State and the individual in accurate dispositions."[24]

Finally, the Court "inquire[d] into the probable value of the psychiatric assistance sought, and the risk of error in the proceeding if such assistance is not offered."[25] The Court explained:

> We begin by considering the pivotal role that psychiatry has come to play in criminal proceedings. More than 40 States, as well as the Federal Government, have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise. For example, in subsection (e) of the Criminal Justice Act, 18 USC § 3006A, Congress has provided that indigent defendants shall receive the assistance of all experts "necessary for an adequate defense." Numerous state statutes guarantee reimbursement for expert services under a like standard. And in many States that have not assured access to psychiatrists through the legislative process, state courts have interpreted the State or Federal Constitution to require that psychiatric assistance be provided to indigent defendants when necessary for an adequate defense, or when insanity is at issue.

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[23] *Id.*

[24] *Id.*

[25] *Id.*

These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, *Solesbee v. Balkcom*, 339 U.S. 9, 12, 70 S.Ct. 457, 458, 94 L.Ed. 604 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric

> profession on the basis of the evidence offered by each party. When jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and "a virtual necessity if an insanity plea is to have any chance of success." By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so. In so saying, we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of the evolving practice.[26]

Therefore, the Court held "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct *an appropriate examination and assist in evaluation, preparation, and presentation of the defense*."[27]

One thing about *Ake* is clear: it sets forth the due process analysis that a court must use when an indigent criminal defendant claims he or she has not been provided "the basic tools of an adequate defense" and therefore did not have "an adequate opportunity to present [his or her] claims fairly within the adversarial system."[28] *Ake* applied this analysis in the context of a request for the assistance of a psychiatric expert in

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[26] *Id*. at 79-82 (citations omitted).

[27] *Id*. at 83 (emphasis added); see also *McWilliams v Dunn*, 582 US___, ___; 137 S Ct 1790, 1799-1800; 198 L Ed 2d 341 (2017).

[28] *Ake*, 470 US at 77 (quotation marks and citation omitted).

order to present an insanity defense. But the Court's analysis of the first two factors from *Mathews* certainly applies to other types of experts and fields of expertise.[29] And many of the Court's observations about psychiatrists and psychiatry also apply equally to other types of experts and fields of expertise.[30]

There is a burgeoning consensus that *Ake*'s due process analysis is not limited to psychiatric experts—a point the prosecutor here concedes.[31] And

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[29] See *id*. at 78-79.

[30] There can be no doubt that many types of expert witnesses—including DNA experts—have played a pivotal role in criminal proceedings. It is undisputed in this case—and indeed seems beyond dispute—that DNA and other types of experts may sometimes "be crucial to the defendant's ability to marshal his defense." *Id*. at 80. And, finally, we have yet to discern an exact science on this topic—indeed, the very notion is incompatible with our adversarial system of justice, in which "juries remain the primary factfinders . . . and they must resolve differences of opinion [among the experts] on the basis of the evidence offered by each party." *Id*. at 81; see also *Hinton v Alabama*, 571 US 263, 276; 134 S Ct 1081; 188 L Ed 2d 1 (2014) ("Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that '[s]erious deficiencies have been found in the forensic evidence used in criminal trials.' . . . This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law."), quoting *Melendez-Diaz v Massachusetts*, 557 US 305, 319; 129 S Ct 2527; 174 L Ed 2d 314 (2009).

[31] 3 LaFave, Criminal Procedure (4th ed), § 11.2(e), p 743 ("A substantial majority of the courts addressing the extension of *Ake* have concluded that psychiatric assistance is not so unique as to invariably exclude from the *Ake* rationale all other types of experts."). See, e.g., *Little v Armontrout*, 835 F2d 1240, 1243 (CA 8, 1987) (holding that "[t]here is no principled way to distinguish between psychiatric and nonpsychiatric experts" and that courts must consider, in each case, "not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given"); *State v Mason*, 82 Ohio St 3d 144, 149; 694 NE2d 932 (1998) ("While *Ake* involved the provision of expert

the vast majority of courts have held that although *Ake* involved a capital case, its reasoning is not limited to such cases.[32] We agree with both conclusions.

B. MCL 775.15: THE STANDARD APPLIED BY MICHIGAN COURTS

Before today, this Court has not acknowledged that *Ake* is the controlling law in this area. Instead, we have analyzed the issue of whether a criminal defendant was entitled to the appointment of an expert witness at public expense under MCL 775.15. That statute provides as follows:

> If any person accused of any crime or misdemeanor, and about to be tried therefor in any court of record in this state, *shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial*, giving the name and place of residence of such witness, and that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness at the place of trial, *the judge in his discretion may*, at a time when the prosecuting officer of the county is present, *make an order that a subpoena be issued from such court for such witness in his favor*, and that it be served by the proper officer of the court. And it shall be the duty of such

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psychiatric assistance only, the case now is generally recognized to support the proposition that due process may require that a criminal defendant be provided other types of expert assistance when necessary to present an adequate defense.").

[32] In this regard, we agree with the Tennessee Supreme Court that "[t]he due process principle of fundamental fairness applies to *all* criminal prosecutions, and does not rest upon the severity of the sanction sought or imposed." *State v Barnett*, 909 SW2d 423, 428 (Tenn, 1995) (emphasis added). See also *Moore v State*, 390 Md 343, 363; 889 A2d 325 (2005) ("The majority of courts that have considered this question have concluded that *Ake* applies to non-capital cases."); *Barnett*, 909 SW2d 423 (and the cases cited therein).

> officer to serve such subpoena, and of the witness or witnesses named therein to attend the trial, and the officer serving such subpoena shall be paid therefor, *and the witness therein named shall be paid for attending such trial, in the same manner as if such witness or witnesses had been subpoenaed in behalf of the people*.[33]

In *People v Jacobsen*,[34] after citing approvingly the dissenting Court of Appeals judge's statement that under this statute "a defendant must 'show a nexus between the facts of the case and the need for an expert,' " we held that "[w]ithout an indication that expert testimony would likely benefit the defense, it was not error to deny without prejudice the motion for appointment of an expert witness."[35]

A few years later, in *People v Tanner*,[36] our Court again addressed the issue of whether an indigent defendant was entitled to the appointment of an expert under MCL 775.15, stating as follows:

> As MCL 775.15 makes clear, a trial court is not compelled to provide funds for the appointment of an expert on demand. In [*Jacobsen*, 448 Mich at 641], this Court held that, to obtain appointment of an expert, an indigent defendant must demonstrate a " 'nexus between the facts of the case and the need for an expert.' " (Citation omitted.) It is not enough for the defendant to show a mere possibility of assistance from the requested expert. "Without an indication that expert testimony would likely

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[33] Emphasis added. See also MCL 767.32, which provides that "[t]he clerk of any county in which an indictment shall be found, upon the application of the defendant, and without requiring any fees, shall issue subpoenas as well during the sitting of any court as in vacation, for such witnesses as the defendant may require, whether residing in or out of the county."

[34] *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995) (citation omitted).

[35] *Id*.

[36] *People v Tanner*, 469 Mich 437; 671 NW2d 728 (2003).

> benefit the defense," a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness.[37]

Jacobsen and *Tanner* are noteworthy for at least two reasons. First, both cases rely on a statute—MCL 775.15—that by its plain text and original meaning does not apply to appointment of expert witnesses; indeed, it was designed for an entirely different purpose. This is made clear by a brief examination of the subject matter the statute *was* intended to cover.

Like its federal counterpart, Michigan's Constitution has always guaranteed that the accused in all criminal proceedings "shall have the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."[38] Not long after statehood, our Legislature enacted the precursor to MCL 775.15, which provided a mechanism for indigent criminal defendants to request the assistance of the court in compelling witnesses to appear at trial at government expense.[39] This statute was last amended in 1877[40] and was recodified in 1927 as MCL 775.15.

MCL 775.15, by its express terms, does not provide for the appointment of expert witnesses. It merely provides a means for subpoenaing certain witnesses and for paying their cost of attending trial. And the mechanism it provides—compelling witnesses to

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[37] *Id*. at 442-423.

[38] See Const 1835, art 1, § 10; Const 1850, art 6, § 28; Const 1908, art 2, § 19; Const 1963, art 1, § 20. See also US Const, Am VI. As it pertained to state criminal proceedings, this was only a matter of state concern until 1965, when the United States Supreme Court decided that the Fourteenth Amendment makes the Sixth Amendment's right to compulsory process applicable to the states. See *Washington v Texas*, 388 US 14, 17-18; 87 S Ct 1920; 18 L Ed 2d 1019 (1967).

[39] See 1849 PA 226.

[40] See 1877 PA 24.

testify—is not the typical way expert witnesses are invited to participate in a criminal proceeding. This is not surprising because the use of expert witnesses was not as thoroughly accepted when the statute was first enacted or when it was later amended.[41] In any event, the statute, which only contemplates "testimony," falls short of the constitutional standard set forth in *Ake*, which clearly requires the assistance of an expert in "conduct[ing] an appropriate examination" and "in evaluation, preparation, and presentation of the defense."[42] While both *Jacobsen* and *Tanner* applied

[41] See *McNally v Colwell*, 91 Mich 527, 536-537; 52 NW 70 (1892) ("And since a man's opinion cannot be met and tested, as could his testimony to the existence of a fact, expert evidence, while useful in many cases, is dangerous in all, and should be restricted, for the purpose of accuracy in determining the truth, which is the aim of all judicial investigation, to those cases where its use is well nigh indispensable because of questions of science or skill being involved, in which a special and peculiar knowledge is desired in order to arrive at the truth."); 1 McCormick on Evidence (7th ed), § 13, p 90 ("In the past three decades, the use of expert witnesses has skyrocketed."); The New Wigmore, Expert Evidence (2d ed), § 1.3, pp 10-11 (noting that while experts were increasingly used at the end of the nineteenth century, criticism of their use was prevalent).

[42] *Ake*, 470 US at 83. Indeed, to the extent that MCL 775.15 could be read as applying to expert witnesses at all, it would only cover a small sliver of what *Ake* requires. By its plain terms, MCL 775.15 applies only when the judge, "in his discretion," orders a subpoena for a witness "within the jurisdiction of the court." Assuming that the subpoenaed witness can be an expert, that expert is not "appointed" for defendant pursuant to the statute. Further, the statute contemplates paying the witness "for attending such trial." Thus, the expert is entitled only to the costs for appearing in court. Generally, for nonexpert witnesses, the statutes provide only $12 per day for this cost, MCL 775.13(1), although expert witnesses can be given more, MCL 775.13a. And because the fees are for actually attending court, the fees would likely only be payable after the expert attends. Cf. *Chase v Kalamazoo Circuit Judge*, 154 Mich 271, 273; 117 NW 660 (1908) ("Fees in criminal cases are not required to be paid in advance. They are only paid after the trial upon due proof of attendance."). In any event, an expert under MCL 775.15 would not be appointed to conduct an examination or aid in the evaluation or

MCL 775.15, neither specifically addressed whether that statute was applicable to requests by an indigent defendant for the appointment of an expert.[43] After *Jacobsen* was decided by this Court, citations by the Court of Appeals of MCL 775.15 in this context have proliferated.[44]

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preparation of the case—the expert would, instead, be compelled to attend the trial and paid only for that attendance. And only experts within the court's jurisdiction are encompassed by the text of the statute. Consequently, if MCL 775.15 extends to expert witnesses—and no one has made this or any other text-based argument that it does—it would cover only a small fraction of *Ake*'s mandate. But any areas of potential overlap would still need to meet the constitutional requirements prescribed by *Ake*.

[43] In *Tanner*, this Court relied exclusively on *Jacobsen*, see *Tanner*, 469 Mich at 442-444; and in *Jacobsen*, this Court, in turn, relied exclusively on the Court of Appeals' dissenting opinion in that case, see *Jacobsen*, 448 Mich at 641, citing *People v Jacobsen*, 205 Mich App 302; 517 NW2d 323 (1994) (TAYLOR, J., dissenting). The dissenting judge assumed, without citing any authority, that MCL 775.15 "authorizes the payment of expert fees in indigent cases." *Jacobsen*, 205 Mich App at 308 (TAYLOR, J., dissenting). Only when we look to the majority opinion in *Jacobsen* do we finally find a case cited for this proposition. *Id*. at 305 (opinion of the Court), citing *People v Miller*, 165 Mich App 32, 47; 418 NW2d 668 (1987). *Miller* appears to be the first appellate decision in Michigan holding that MCL 775.15 governs a trial court's decision whether to appoint an expert witness upon the request of an indigent criminal defendant, although that opinion, too, failed to explain why this is so. The only case it cited, *People v Thornton*, 80 Mich App 746; 265 NW2d 35 (1978), could possibly be read as indicating in dictum that the statute applied to an expert witness, given that one of the witnesses at issue in that case was "an orthopedic surgeon with ballistics expertise." *Id*. at 749, 752. However, whether this dictum even applies to an expert witness is unclear—the opinion does not indicate the nature of the witness's expected testimony, given that the defense refused to disclose the information in open court. *Id*. at 749. In any event, the case *Thornton* cited, *People v Thomas*, 1 Mich App 118; 134 NW2d 352 (1965), did not involve expert witnesses.

[44] Only two Court of Appeals panels applied MCL 775.15 to requests by an indigent defendant for payment of expert witnesses before this Court decided *Jacobsen*, see *In re Klevorn Attorney Fees*, 185 Mich App 672, 678-679; 463 NW2d 175 (1990); *People v Davis*, 199 Mich App 502,

Second, *Jacobsen* and *Tanner* are noteworthy for another reason—neither opinion cited *Ake* or applied its due process framework in determining whether a trial court should grant a request by an indigent criminal defendant for the appointment of an expert witness; nor did either opinion attempt to distinguish *Ake*.[45]

We conclude that the Legislature did not intend MCL 775.15 to encompass requests by an indigent criminal defendant for the appointment of an expert at government expense, and we overrule *Jacobsen* and *Tanner* to the extent that they hold or suggest to the contrary.[46] Instead, we hold—as we must[47]—that the *Ake* due process analysis governs such requests.

C. *MOORE v KEMP*: THE REASONABLE PROBABILITY STANDARD

Although *Ake* governs requests by an indigent criminal defendant for the appointment of an expert at government expense, the Supreme Court has not ex-

518; 503 NW2d 457 (1993), rev'd on other grounds by *People v Grissom*, 492 Mich 296 (2012). Since *Jacobsen* was decided by this Court, however, citations of MCL 775.15 for this purpose have increased to well over 100 cases.

[45] This point was raised by Judge Raymond Kethledge at oral argument when *Tanner* was before the United States Court of Appeals for the Sixth Circuit on habeas review last year; the Sixth Circuit recently granted a new trial in that case on sufficiency of the evidence grounds, so it did not address the defendant's argument that our Court unreasonably applied *Ake*. *Tanner v Yukins*, 867 F3d 661, 663 (CA 6, 2017). While the defendant in *Tanner* cited *Ake* in support of her contention that she was entitled to the appointment of an expert, she did not argue that *Ake* required a different standard than that employed by this Court in *Jacobsen*.

[46] We express no opinion as to whether, under the standard adopted in this opinion, *Jacobsen* and *Tanner* correctly held that the defendants in those cases were not entitled to expert assistance.

[47] See US Const, art VI, cl 2.

plained how this showing must be made. This question is critical. Until an expert is consulted, a defendant might often be unaware of how, *precisely*, the expert would aid the defense. If, in such cases, the defendant were required to prove in detail with a high degree of certainty that an expert would benefit the defense, the defendant would essentially be tasked with the impossible: to get an expert, the defendant would need to already know what the expert would say.[48] At the same time, the defendant's bare assertion that an expert would be beneficial cannot, without more, entitle him or her to an expert; otherwise, every defendant would receive funds for experts upon request.[49]

A majority of states confronting this problem have adopted a reasonable probability standard.[50] In *Moore v Kemp*, the United States Court of Appeals for the Eleventh Circuit discussed this standard as follows:

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[48] See *People v Agar*, 314 Mich App 636, 642; 887 NW2d 662 (2016) ("We are troubled by the logic that a defendant who admits technical ignorance and who has no resources from which to acquire technical expertise is asked to present evidence of what evidence an expert would offer in order to receive public funds to hire the expert."), vacated in part and reversed in part 500 Mich 891 (2016); *People v Carnicom*, 272 Mich App 614, 620; 727 NW2d 399 (2006) (COOPER, J., concurring) ("If the court provides to indigent defendants the right to a court appointed and funded expert witness, there can be no requirement that the defendant first show the expert will support his claim. Otherwise, the right affords defendants no protection at all.").

[49] Cf. *Caldwell v Mississippi*, 472 US 320, 323 n 1; 105 S Ct 2633; 86 L Ed 2d 231 (1985) (citing *Ake* and noting that "[g]iven that petitioner offered little more than undeveloped assertions that the requested [expert] assistance would be beneficial, we find no deprivation of due process in the trial judge's decision" to deny the defendant's request for appointment of experts).

[50] See *State v Davis*, 318 SW3d 618, 634-365 (Mo, 2010) (characterizing the reasonable probability test as "the prevailing test" used by a "host of jurisdictions"); *Moore*, 390 Md at 367 ("The test that seems to have been adopted by the majority of courts considering the issue is the one enunciated by the United States Court of Appeals for the Eleventh Circuit in *Moore v. Kemp*.").

> [A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather . . . a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution's proof—by preparing counsel to cross-examine the prosecution's experts or by providing rebuttal testimony—he must inform the court of the nature of the prosecution's case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the evidence linking him to the crime. By the same token, if the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense, as the defendant did in *Ake*. In each instance, the defendant's showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant's motion, because the court would not know what type of expert was needed. In addition, the defendant should inform the court why the particular expert is necessary. We recognize that defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide. We do believe, however, that defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to the defense's case.[51]

We believe that the standard articulated in *Moore* strikes the right balance between requiring too much

[51] *Moore*, 809 F2d at 712.

or too little of a defendant seeking the appointment of an expert under *Ake*. Therefore, we adopt *Moore*'s reasonable probability standard as the appropriate standard for courts to apply in determining whether an indigent criminal defendant is entitled to the appointment of an expert at government expense under *Ake*'s due process analysis. In particular, we hold that "a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial."[52]

IV. CONCLUSION

For the reasons stated above, we hold that the Court of Appeals erred by analyzing defendant's request for expert assistance under MCL 775.15 instead of *Ake*. Thus, we vacate the Court of Appeals' decision, and we remand to the Court of Appeals for application of the *Ake* due process analysis and, in particular, consideration of whether defendant made a sufficient showing that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.[53]

MARKMAN, C.J., and ZAHRA, MCCORMACK, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred with VIVIANO, J.

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[52] *Id*.

[53] We leave to the Court of Appeals on remand all remaining issues, which shall be resolved consistently with this opinion.

PEOPLE v OROS

Docket No. 156241. Argued on application for leave to appeal March 7, 2018. Decided July 5, 2018.

Christopher A. Oros was convicted following a jury trial in the Kalamazoo Circuit Court of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), first-degree arson, MCL 750.72, second-degree home invasion, MCL 750.110a(3), and escape while awaiting trial, MCL 750.197(2). The trial court, Paul J. Bridenstine, J., sentenced defendant to life imprisonment without the possibility of parole for his first-degree premeditated and felony murder convictions, 25 to 40 years' imprisonment for his first-degree arson conviction, 10 to 22½ years' imprisonment for his second-degree home-invasion conviction, and 2 to 6 years' imprisonment for his escape-while-awaiting-trial conviction. Defendant appealed as of right his first-degree premeditated murder conviction in the Court of Appeals, arguing that insufficient evidence existed to sustain his jury conviction because the prosecution failed to present at trial any evidence from which the jury could reasonably find that he acted with premeditation and deliberation. In a published per curiam opinion issued June 8, 2017, the Court of Appeals, STEPHENS, P.J., and SHAPIRO and GADOLA, JJ., held that there was insufficient evidence to sustain defendant's first-degree premeditated murder jury conviction and reduced his conviction to second-degree murder. 320 Mich App 146 (2017). The Court of Appeals applied the factors set forth in *People v Schollaert*, 194 Mich App 158 (1992), and explained that it found the circumstances surrounding the killing to be the most significant factor. The Court of Appeals rejected the prosecution's argument that defendant had adequate time to consciously reconsider his actions in a "second look," believing that *People v Hoffmeister*, 394 Mich 155 (1975), excluded the notion that premeditation could be formed between successive stab wounds. Therefore, the Court of Appeals vacated defendant's first-degree premeditated murder conviction, imposed a second-degree murder conviction, and ordered a remand to the trial court for sentencing as to that offense. The prosecution sought leave to appeal, and the Supreme Court

ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 883 (2017).

In an opinion by Justice WILDER, joined by Chief Justice MARKMAN and Justices ZAHRA, BERNSTEIN, and CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

Given the record evidence presented at defendant's trial, a reasonable juror could have found that the killing was committed with premeditation and deliberation. Defendant's first-degree premeditated murder conviction and sentence must be reinstated.

1. When considering a sufficiency-of-the-evidence challenge, a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. To secure a conviction of first-degree premeditated murder, MCL 750.316(1)(a), the prosecution must establish beyond a reasonable doubt a murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing. The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation. To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.

2. The elements of premeditation and deliberation may be established by an interval of time between the initial homicidal thought and ultimate action, which would allow a reasonable person time to subject the nature of his or her action to a "second look." That is, some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation, but it is within the province of the fact-finder to determine whether there was sufficient time for a reasonable person to subject his or her action to a second look. What constitutes sufficient evidence to support the elements of premeditation and deliberation may vary from case to case because the factual circumstances will vary, but the ultimate answer may be resolved in light of the entire factual record introduced at trial and by determining whether reasonable inferences may be made to support the fact-finder's verdict.

3. In this case, a rational trier of fact had sufficient evidence from which to draw reasonable inferences that defendant acted with premeditation and deliberation. The prosecution presented evidence that directly conflicted with defendant's description of what transpired in the apartment, including that defendant did

not have any head injuries consistent with his claim that the victim struck him over the head with a coffee mug and that shattered pieces of the coffee mug collected at the scene were DNA tested, revealing the presence of the victim's blood and hair—not defendant's. The jury chose to resolve the conflicting evidence in favor of the prosecution, and on appellate review the evidence contradicting defendant's version of the crime must be considered in a light most favorable to the prosecution, with every reasonable inference viewed in favor of the jury verdict. Evidence of defendant's conflicting statements and that he was the initial aggressor allowed the jury to infer that he acted without provocation and in a cool state of mind rather than on impulse when his assaultive conduct escalated from striking the victim in the head with a coffee mug to gaining control of a kitchen knife, to punching the victim in the face, to finally stabbing the victim 29 times to her death. An inference of each element of premeditation and deliberation could be drawn from this evidence—that is, defendant thought about killing the victim before proceeding to kill the victim, and defendant measured and evaluated his choices before proceeding to kill the victim.

4. By defendant's own admission, these acts were distinct and separate from one another. While it was not possible to pinpoint the exact moment defendant thought about killing the victim and measured and evaluated his choices, the inference could be drawn that his decision to kill the victim and his evaluation of his options arose separately before he obtained a lethal weapon. It was possible that defendant could have thought about the killing before first striking the victim over the head with a coffee mug or when he punched the victim in the face. Either way, both acts supported the inference that defendant had and took time for reflection before proceeding to stab the victim because defendant had to think about obtaining the knife—a lethal weapon—to accomplish his desired act of killing the victim. Additionally, the prosecution argued that defendant may have retrieved the knife from the victim's kitchen, while defendant told the police that he obtained the knife from the victim herself after struggling with her for it; either way, a period of time between the initial homicidal intent and the ultimate killing existed, during which defendant could have taken a "second look." Likewise, it was reasonable to infer that defendant had the opportunity for a "second look" during the period of time that elapsed when he flipped the victim over to position her facedown on the floor, climbed onto her back, and then continued to stab her. It took thought and reflection to flip the victim over, which permitted an inference that defendant acted with both premeditation and

deliberation. Moreover, the location and depth of the victim's stab wounds supported an inference that defendant thought about, measured, and evaluated his options; many of the stab wounds were anywhere from 2 to 5 inches deep, which would indicate the amount of force used to not only plunge the knife into the victim's body, but also to retract it. It was reasonable for a juror to infer that sufficient time existed between each stab wound to allow defendant the opportunity to take a "second look," and therefore it was reasonable for a juror to infer that the killing was committed with premeditation and deliberation. Accordingly, the jury had sufficient evidence from which it could conclude beyond a reasonable doubt that defendant was guilty of first-degree premeditated murder, and the Court of Appeals erred when it improperly usurped the role of the fact-finder and misapplied this Court's opinion in *Hoffmeister*. This holding is consistent with *Hoffmeister* because the sheer number of stab wounds alone did not establish the elements of premeditation and deliberation; rather, the jury could have reasonably inferred and found from the factual record—separate and distinct from the sheer number of stab wounds alone—that defendant had an opportunity to subject his actions to a "second look" and therefore acted with premeditation and deliberation.

Part II of the Court of Appeals' opinion reversed; defendant's first-degree premeditated murder conviction and sentence reinstated.

Justice MCCORMACK, joined by Justice VIVIANO, dissenting, would have affirmed the judgment of the Court of Appeals because there was insufficient evidence for a rational trier of fact to infer proof beyond a reasonable doubt that defendant's decision to kill the victim was premeditated and deliberated. The majority treated premeditation, deliberation, and intent to kill as fungible—thereby collapsing the distinction between first- and second-degree murder—and lost sight of the burden of proof when it held that the possibility that defendant could have premeditated and deliberated is all that is required. While a jury can make reasonable inferences to arrive at a verdict, the prosecution must produce sufficient evidence to make the jury's inferences reasonable; the inferences must have support in the record and cannot be arrived at by mere speculation. A deliberate and premeditated killing requires proof beyond merely thinking twice—the prosecutor must show that the perpetrator's thought process had the right timing (premeditated) and was of the right quality (deliberate). Time to take a second look is necessary, but not sufficient, for a finding of premeditation

and deliberation. Sufficient opportunity to take a second look is better thought of as a precondition for a finding of premeditation and deliberation: the prosecution must prove first that there was sufficient time to allow the defendant to take a "second look" after forming the intent to kill and, second, that the defendant did, in fact, premeditate before acting on the intent to kill. In short, premeditation requires some passage of time, but the passage of time does not prove premeditation, much less deliberation. In this case, the gruesome physical evidence allowed the jury to infer a single fact—that the defendant might have had sufficient time to take a second look. But beyond that, the jury could only speculate between two possibilities: either the defendant did premeditate and deliberate, or he did not. Because that determination was no better than a coin flip, the jury could not find proof beyond a reasonable doubt of premeditation and deliberation. Additionally, by announcing that the possibility of premeditation and deliberation is all that is required, the majority effectively overruled *Hoffmeister*, which held that evidence is insufficient when it merely leaves open the possibility of premeditation and deliberation. Proof beyond a reasonable doubt is required for every element of a crime, and in this case there was no basis in the evidence for a rational trier of fact to infer proof beyond a reasonable doubt that defendant's decision to kill the victim was premeditated and deliberated.

CRIMINAL LAW — FIRST-DEGREE PREMEDITATED MURDER — PREMEDITATION AND DELIBERATION.

Premeditation and deliberation is determined from all the circumstances of the particular case and those reasonable inferences that may arise from the evidence; what constitutes sufficient evidence to support the elements of premeditation and deliberation may vary from case to case because the factual circumstances will vary, but the ultimate answer may be resolved in determining whether reasonable inferences may be made to support the fact-finder's verdict; premeditation and deliberation may be established by an interval of time between the initial homicidal thought and ultimate action, which would allow a reasonable person time to subject the nature of his or her action to a "second look"; that is, some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation, but it is within the province of the fact-finder to determine whether there was sufficient time for a reasonable person to subject his or her action to a second look.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jeffrey S. Getting*, Prosecuting Attorney, and *Heather S. Bergmann*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Desiree M. Ferguson*) for defendant.

WILDER, J. This case involves an issue germane to every criminal trial—that is, whether sufficient evidence exists to support a defendant's conviction. In particular, the question before us is whether sufficient evidence exists to support defendant's jury conviction of first-degree premeditated murder, MCL 750.316(1)(a). Defendant does not dispute that he intended to kill the victim, Marie McMillan, when he stabbed her 29 times; rather, he argues that insufficient proofs were presented at trial with regard to the elements of premeditation and deliberation to sustain his conviction. The Court of Appeals agreed, concluding that there was insufficient evidence of premeditation and deliberation, and therefore reduced defendant's first-degree premeditated murder conviction to second-degree murder.

A thorough review of the record requires a contrary result. We hold that the Court of Appeals erred when it improperly usurped the role of the fact-finder and misapplied this Court's opinion in *People v Hoffmeister*, 394 Mich 155; 229 NW2d 305 (1975). In lieu of granting leave to appeal, we reverse Part II of the Court Appeals opinion and hold that, based on the record evidence presented at defendant's trial, a reasonable juror could have found that the killing was committed with premeditation and deliberation. Defendant's first-degree premeditated murder conviction and sentence must be reinstated.

I. FACTS AND PROCEDURAL HISTORY

On November 22, 2014, defendant went door-to-door targeting the residents of Clayborne Court Apartments in Kalamazoo, Michigan, in an attempt to solicit money. Defendant's ruse was that his girlfriend had left him without access to his vehicle, debit card, or cell phone. Defendant asked each resident if he could use their phone so that he could contact his girlfriend. If allowed to do so, defendant would actually place a call to his own cell phone, which was located inside his vehicle where no one was available to answer it. After an "unsuccessful" call, defendant would directly or indirectly solicit money from each resident, claiming that he needed gas money to get to work. According to one resident, the solicitation started out passive, but quickly turned aggressive. Another resident testified that he felt uncomfortable because he sensed defendant was casing his apartment.

Defendant used this same subterfuge to gain access to the victim's apartment. During the police investigative interview, defendant admitted that he was able to persuade the victim to let him inside the apartment, and once inside, he used the victim's phone just as he had with the other residents. According to defendant, the victim, acting without provocation, struck him over the head with a coffee mug, knocking him to the floor. Defendant further stated that, at some point, the victim climbed on top of him with a "huge knife in her hand." A struggle over the knife ensued, and after defendant gained control over the knife, he began stabbing the victim. The victim sustained a total of 29 stab wounds, 19 of which were inflicted while she was still alive.

Defendant was charged with open murder, MCL 750.316.[1] At the conclusion of defendant's trial, the trial court instructed the jury on the elements of the crimes of first-degree premeditated murder, second-degree murder, and voluntary manslaughter as well as the evidentiary findings beyond a reasonable doubt that were required to convict defendant of any of these crimes. Specifically, the trial court stated:

> The Defendant is charged with open murder. To prove first degree premeditated murder, the Prosecutor must prove each of the following elements beyond a reasonable doubt.
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> First, that the Defendant caused the death of Marie McMillan, that is, that Marie McMillan died as a result of a stabbing. Second, that the Defendant intended to kill Marie McMillan. Third, that this intent to kill was premeditated, that is thought out beforehand. Fourth, that the killing was deliberate which means that the Defendant considered the pros and cons of the killing and thought about and chose his actions before he did it. There must have been real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill. The law does not say how much time is needed. It is for you to decide if enough time passed under the circumstances of this case. The killing cannot be the result of a sudden impulse without thought or reflection. Fifth, that the killing was not justified, excused or done under circumstances that reduce it to a lesser crime.
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> To prove second degree murder the Prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the Defendant caused the death of Marie McMillan, that is, that Marie McMillan died as a result of a stabbing. Second, that the Defendant had one of these three states of mind: he intended to kill, or he intended to

[1] Defendant was also charged with first-degree felony murder, MCL 750.316(1)(b), first-degree arson, MCL 750.72, second-degree home invasion, MCL 750.110a(3), and escape while awaiting trial, MCL 750.197(2), but those convictions are not presently before us on appeal.

> do great bodily harm to Marie McMillan, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of actions. Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.
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> In count one, if you find the Defendant guilty of murder you must state in your verdict whether it is murder in the first degree or murder in the second degree.
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> The crime of murder may be reduced to voluntary manslaughter if the Defendant acted out of passion or anger brought about by adequate cause and before the Defendant had a reasonable time to calm down. For manslaughter, the following two things must be present. First, when the Defendant acted his thinking must be disturbed by emotional excitement to the point that a reasonable person might have acted in impulse without thinking twice from passion instead of judgment. This emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide.
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> Second, the killing itself must result from this emotional excitement. The Defendant must have acted before a reasonable time had passed to calm down and return to reason. The law does not say how much time is needed. That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case.

The jury retired to deliberate, and following its deliberation, the jury returned, finding defendant guilty of first-degree premeditated murder, MCL 750.316(1)(a). The trial court imposed a life imprisonment sentence without the possibility of parole for that conviction.

Defendant appealed, arguing that the prosecution failed to present sufficient proof to support the elements of premeditation and deliberation, and therefore his first-degree premeditated murder conviction rested

upon insufficient evidence. The Court of Appeals agreed with defendant, finding that there was sufficient evidence to support a second-degree murder conviction but not defendant's first-degree premeditated murder jury conviction. *People v Oros*, 320 Mich App 146, 150; 904 NW2d 209 (2017). The Court of Appeals applied the factors set forth in *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992),[2] and explained that it found the circumstances surrounding the killing as the most significant factor. *Oros*, 320 Mich App at 155-156. The Court of Appeals rejected the prosecution's argument that defendant had adequate time to consciously reconsider his actions in a "second look," believing that this Court in *Hoffmeister* excluded the notion that premeditation could be formed between successive stab wounds. *Id*. at 156-157. Based on this understanding, the Court of Appeals vacated defendant's first-degree premeditated murder jury conviction, imposed a second-degree murder conviction, and ordered a remand to the trial court for sentencing as to that offense. *Id*. at 167-168.

The prosecution sought leave to appeal in this Court, and we directed the Clerk to schedule oral argument on the application and the parties to address the following issue:

> [W]hether the Court of Appeals properly viewed the trial record for sufficient evidence of premeditation and deliberation in the light most favorable to the prosecution, including drawing all reasonable inferences in favor of the jury verdict, and whether the record evidence is sufficient

[2] In *Schollaert*, the Court of Appeals set forth the following factors to consider when determining whether premeditation has been established: "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Schollaert*, 194 Mich App at 170.

to sustain defendant's conviction for first-degree premeditated murder. *People v Gonzalez*, 468 Mich 636, 640-641 (2003). [*People v Oros*, 501 Mich 883 (2017).]

II. STANDARD OF REVIEW

"In determining whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the prosecution, and considers whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *People v Harris*, 495 Mich 120, 126; 845 NW2d 477 (2014). But more importantly, "[t]he standard of review is deferential: a reviewing court is *required* to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (quotation marks and citation omitted; emphasis added). "It is for the trier of fact, *not the appellate court*, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) (emphasis added).

III. LEGAL BACKGROUND

A. FIRST-DEGREE PREMEDITATED MURDER

In pertinent part, to secure a conviction of first-degree premeditated murder, the prosecution must establish beyond a reasonable doubt[3] a "[m]urder per-

[3] Indeed, due process requires the prosecution to prove every element beyond a reasonable doubt. *Patterson v New York*, 432 US 197, 210; 97

petrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing." MCL 750.316(1)(a).[4] Relevant here, "[t]he elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).[5] "Premeditation and deliberation are legislative offspring and are to be construed in the light of the statutory scheme." *People v Morrin*, 31 Mich App 301, 325; 187 NW2d 434 (1971).

The Legislature did not explicitly define the meaning of premeditation and deliberation. However, we have recognized the ordinary meaning of the distinct and separate terms as the following: "[t]o premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Woods*, 416 Mich 581, 599 n 2; 331 NW2d 707 (1982) (quotation marks and citation omitted).[6] While the statute may be clear on its face that

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S Ct 2319; 53 L Ed 2d 281 (1977). Inferences generally do not affect the application of this standard because it leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof to the defendant. *Co Court of Ulster Co, NY v Allen*, 442 US 140, 157; 99 S Ct 2213; 60 L Ed 2d 777 (1979). The exception is, of course, if "there is *no* rational way the trier could make the connection permitted by the inference." *Id*. (emphasis added).

[4] Cf. *People v Blevins*, 314 Mich App 339, 358; 886 NW2d 456 (2016) ("Second-degree murder is any kind of murder not otherwise specified in the first-degree murder statute. MCL 750.317. It is well established that 'second-degree murder is first-degree murder *minus* premeditation' . . . ."), quoting *People v Carter*, 395 Mich 434, 438; 236 NW2d 500 (1975).

[5] Defendant does not dispute that he intentionally killed the victim. Thus, we will focus only on the elements of premeditation and deliberation.

[6] The meaning of premeditation and deliberation, and the relation of "second look" law to those elements, is well engrained in our state's jurisprudence, and notably, neither party has asked that the state of our

premeditation and deliberation are separate elements, a rigid and mechanical application is often difficult because the same facts may tend to establish each element, and they are subjective factors usually incapable of direct proof absent an admission or confession by the defendant. See Cardozo, What Medicine Can Do for Law, in *Law and Literature and Other Essays and Addresses* (New York: Harcourt, Brace & Co, 1931), p 97 ("[O]n the face of the statute the distinction is clear enough. The difficulty arises when we try to discover what is meant by the words deliberate and premeditated."); see also *Morrin*, 31 Mich App at 331, citing *People v Wolf*, 95 Mich 625; 55 NW 357 (1893).

"Since the distinguishing elements of first-degree murder ultimately resolve themselves into questions of fact, minimum standards of proof, if reasonably related to the circumstances which must be proved, will serve to preserve the distinction between first-degree and second-degree murder." *Morrin*, 31 Mich App at 328. "The real focus of first-degree murder jurisprudence in Michigan has been on the kind of evidence which permits an inference of premeditation and deliberation," and that inference may be established "from *all* the facts of the case."[7] *Id*. at 328, 331 (emphasis added).

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law be changed. Therefore, unlike the dissent, we decline to redefine the meaning that our jurisprudence has attached to the elements of premeditation and deliberation, and the relation of second-look law, which is discussed in more detail below, to those elements. See *post* at 252-253, 254 (MCCORMACK, J., dissenting) ("[A] deliberate and premeditated killing requires proof beyond merely thinking twice—the prosecutor must show that the perpetrator's thought process had the right *timing* (premeditated) and was of the right *quality* (deliberate)"; "sufficient opportunity to take a second look is better thought of as a *precondition* for a finding of premeditation and deliberation.").

[7] An inference is the logical bridge between a fact believed to be true and a second fact, the truth of which is at issue. Dressler, Understanding Criminal Law (3d ed), § 8.03, p 77. "The jury is permitted to infer

In other words, when considering a sufficiency-of-the-evidence issue, "[t]he question is whether the evidence introduced at the trial fairly supports an inference of premeditation and deliberation." *Id*. at 331.

B. SECOND LOOK

Premeditation and deliberation may be established by an interval of time between the initial homicidal thought and ultimate action, which would allow a reasonable person time to subject the nature of his or her action to a "second look."[8] *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003); *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). That is, "some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation," but it is within the province of the fact-finder to determine whether there was sufficient time for a reasonable person to subject his or her action to a second look. See *Gonzalez*, 468 Mich at 641 (quotation marks, brackets, and citation omitted). "While the minimum time necessary to exercise this process is incapable of exact determination," *Tilley*, 405 Mich at 45 (quotation marks and citation omitted), "[i]t is often said that premeditation and deliberation

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from one fact the existence of another essential to guilt, if reason and experience support the inference. In many circumstances courts hold that proof of the first fact furnishes a basis for inference of the existence of the second." *Tot v United States*, 319 US 463, 467; 63 S Ct 1241; 87 L Ed 1519 (1943).

[8] Although not in dispute, it is important to note that the jury in the instant case was instructed on "second look." Specifically, the trial court articulated the following instruction: "There must have been real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill. The law does not say how much time is needed. It is for you to decide if enough time passed under the circumstances of this case. The killing cannot be the result of a sudden impulse without thought or reflection."

require only a 'brief moment of thought' or a 'matter of seconds,' " 2 LaFave, Substantive Criminal Law (3d ed), § 14.7(a), p 650 (citations omitted).[9] "By the weight of authority the deliberation essential to establish murder in the first degree need not have existed for any particular length of time before the killing." 4 Blackstone, Commentaries on the Laws of England, p *195 n 14. "The time within which a wicked purpose is formed is immaterial, provided it is formed without disturbing excitement. The question of deliberation, when all the circumstances appear, is one of plain common sense; and an intelligent jury can seldom be at a loss to determine it." *People v Holmes*, 111 Mich 364, 372; 69 NW 501 (1896) (quotation marks and citation omitted).

"The requisite state of mind may be inferred from defendant's conduct judged in light of the circumstances." *Hoffmeister*, 394 Mich at 159. In other words, what constitutes sufficient evidence to support the

[9] Second-look law has been well established in Michigan for over 150 years—dating back even before the codification of the degrees of murder. See *Maher v People*, 10 Mich 212, 223-224 (1862) ("No precise time, therefore, *in hours or minutes*, can be laid down by the court, as a rule of law, within which the passions *must be held* to have subsided and reason to have resumed its control, without setting at defiance the laws of man's nature, and ignoring the very principle on which provocation and passion are allowed to be shown, at all, in mitigation of the offense. The question is one of reasonable time, depending upon all the circumstances of the particular case; and where the law has not defined, and can not without gross injustice define the precise time which shall be deemed reasonable, as it has with respect to notice of the dishonor of commercial paper. In such case, where the law has defined what shall be reasonable time, the question of such reasonable time, the facts being found by the jury, is one of law for the court; but in all other cases it is a question of fact for the jury; and the court can not take it from the jury by assuming to decide it as a question of law, without confounding the respective provinces of the court and jury[.]").

elements of premeditation and deliberation may vary from case to case because the factual circumstances will vary, but the ultimate answer may be resolved by determining whether reasonable inferences may be made to support the fact-finder's verdict. For example, in *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999), this Court held that evidence of a struggle between the defendant and the victim can be evidence of premeditation and deliberation based on the defendant's opportunity to take a "second look." And this Court has also held that "[m]anual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look.' " *Gonzalez*, 468 Mich at 641. But in *Hoffmeister*, this Court found that insufficient evidence existed to show premeditation and deliberation because, when the only evidence presented was the number of stab wounds, there was no basis for the jury to conclude that the defendant had adequate time for a "second look." *Hoffmeister*, 394 Mich at 159, 161.

IV. APPLICATION

With this legal background in mind, we now turn to the application of these principles in the instant case. Upon a review of the record in the light most favorable to the prosecution, it is apparent that a rational trier of fact, in this case the jury, had sufficient evidence from which to draw reasonable inferences that defendant acted with premeditation and deliberation.[10]

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[10] Rather than treating this as a sufficiency-of-the-evidence issue, which arises *after* the fact-finder has *already* found the defendant guilty of the charged crime, the dissent implicitly treats this issue as the appellate review of a motion for directed verdict or an instructional question examining whether the charge should have been submitted to the jury in the first instance. This is not, however, the posture of the case before us, as defendant has not raised either of those issues. Instead, the

Defendant first told the lead detective that there were two men in the victim's apartment who struck him in the head with a stick and that he was able to run away without incident. According to the detective, defendant then changed his story and admitted that the victim allowed him to come inside her apartment. Once inside, defendant sat at a computer desk to use the telephone. At that point, defendant claimed that the victim struck him over the head with a coffee mug, knocking him to the ground, and climbed on top of him with "a huge knife in her hand." Defendant stated that he was pinned down on the ground by the victim for two hours. A struggle ensued, and at some point, defendant stated that he was able to gain control of the knife. While holding the knife in one hand, defendant punched the victim in the face with his other fist. He then proceeded to stab the victim in the stomach.

The prosecution presented evidence that directly conflicted with defendant's description of what transpired in the apartment. That evidence included the following: (1) defendant did not have any head injuries consistent with his claim that the victim struck him over the head with a coffee mug, and (2) shattered pieces of the coffee mug collected at the scene were DNA tested, revealing the presence of the victim's blood and hair—not defendant's. The jury chose to

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first-degree premeditated murder charge *was* submitted to the jury (along with second-degree murder and voluntary manslaughter) as is appropriate when a defendant has been charged with open murder. After deliberating, the jury found defendant guilty of first-degree premeditated murder. Having been charged with open murder, it was the province of the jury, and not of the court, to measure the quantity of proof and decide whether there was sufficient evidence to support a first-degree premeditated murder conviction. *People v Collins*, 303 Mich 34, 51; 5 NW2d 556 (1942). Therefore, our focus at this juncture is determining whether sufficient evidence was presented at defendant's trial to support the verdict rendered by the jury.

resolve the conflicting evidence in favor of the prosecution. See *Hardiman*, 466 Mich at 431 (stating that it is the jury's function to weigh competing evidence). On appellate review, we accept as true the evidence contradicting defendant's version of the crime, as we must consider the evidence in a light most favorable to the prosecution, see *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992) ("[T]his Court determined long ago that when an appellate court reviews the evidence supporting a conviction, factual conflicts are to be viewed in a light favorable to the prosecution[.]"), and view every reasonable inference in favor of the jury verdict. We conclude that from this evidence, an inference may be fairly drawn that defendant was the initial aggressor and not the victim, as defendant had claimed.

Evidence of defendant's conflicting statements and that he was the initial aggressor allowed the jury to infer that he acted without provocation and in a cool state of mind rather than on impulse when his assaultive conduct escalated from striking the victim in the head with a coffee mug to gaining control of a kitchen knife, to punching the victim in the face, to finally stabbing the victim 29 times to her death. See *Holmes*, 111 Mich at 372 ("[W]henever murder is intentionally committed, without serious provocation, and under circumstances which do not reasonably account for such an excitement of passion as naturally deprives men of deliberation, common experience teaches us that such an act is wanton, and its perpetrator responsible for it, as in other cases of cold-blooded crime."). An inference of each element of premeditation and deliberation may be drawn from this evidence—that is, defendant thought about killing the victim before pro-

ceeding to kill the victim, and defendant measured and evaluated his choices before proceeding to kill the victim.

By defendant's own admission, these acts were distinct and separate from one another. While we are incapable of pinpointing the exact moment defendant thought about killing the victim and measured and evaluated his choices, the inference may be drawn that his decision to kill the victim and his evaluation of his options arose separately before he obtained a lethal weapon. It is possible defendant may have thought about the killing before first striking the victim over the head with a coffee mug or when he punched the victim in the face.[11] Either way, both acts support the inference that defendant had and took time for reflection before proceeding to stab the victim.

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[11] There is ample authority holding that when the evidence permits a jury to infer that the defendant had the opportunity to premeditate, this alone is sufficient evidence that he or she did so. Examples include *Tilley*, 405 Mich at 45 (holding that the jury had sufficient evidence to support the conclusion of ample opportunity to premeditate and deliberate in the interval of time between the defendant securing possession of the gun and the volley of shots as the victim was retreating); see also *People v DeRuyscher*, 29 Mich App 515, 517-518; 185 NW2d 561 (1971) (holding that a sufficient lapse of time between the defendant's separate acts of hitting, kicking, and stomping allowed the possibility that the defendant acted with premeditation and holding that the weight of such evidence was within the province of the jury); *People v Statkiewicz*, 247 Mich 260, 264; 225 NW 540 (1929) (holding that the defendant had ample time, i.e., opportunity, to form malice and that it was for the jury to determine the intent with which the shooting was done); *People v Bigelow*, 225 Mich App 806; 571 NW2d 520 (1997), special panel convened, opinion vacated on other grounds (September 16, 1997), and opinion reinstated 229 Mich App 218 (1998) (holding that sufficient evidence of first-degree premeditated murder existed when evidence revealed, in relevant part, that defendant did not initially plan to participate in the murder but at the scene, he found a letter opener, which was used by another perpetrator to stab the victim).

That is because defendant had to think about obtaining the knife—a lethal weapon—to accomplish his desired act of killing the victim. The prosecution argued that defendant may have retrieved the knife from the victim's kitchen, while defendant told the police that he obtained the knife from the victim herself after struggling with her for it. Either way, a period of time between the initial homicidal intent and the ultimate killing existed, during which defendant could have taken a "second look."[12] See, e.g., *People v Waters*, 118 Mich App 176, 187; 324 NW2d 564 (1982) (finding that an inference could be made that the formation of the homicidal intent occurred between the time that the defendant drew the weapon from his waistband and the instant he pulled the trigger).

Likewise, it is reasonable to infer that defendant had the opportunity for a "second look" during the period of time that elapsed when he flipped the victim over to position her facedown on the floor, climbed onto her back, and then continued to stab her. It took thought and reflection to flip the victim over, permitting an inference that defendant acted with both premeditation and deliberation. Moreover, the location and depth of the victim's stab wounds support an inference that defendant thought about, measured, and evaluated his options. Many of the stab wounds were anywhere from 2 to 5 inches deep, which would

[12] The dissent asserts that the mere passage of time cannot alone constitute sufficient evidence of premeditation and deliberation to sustain a conviction of first-degree murder. However, as noted earlier, our caselaw has consistently recognized that the requisite premeditation and deliberation can be formed solely in the amount of time necessary to take a "second look." If premeditation and deliberation can be formed in the passage of time needed to take a "second look," then it necessarily follows that the passage of time might be the only evidence of premeditation and deliberation in light of the surrounding circumstances and that this would be sufficient to sustain the conviction.

indicate the amount of force used to not only plunge the knife into the victim's body, but also to retract it. Given the amount of effort expended for these particular stab wounds, it was reasonable for the jury to infer that sufficient time existed between each stab wound to allow defendant the opportunity to take a "second look." Therefore, given the record evidence, which reveals that defendant's action escalated from physically assaultive conduct to the repeated use of a lethal weapon over an unspecified interval of time, we conclude that a reasonable juror could have found that the killing was committed with premeditation and deliberation.

Our holding is consistent with *Hoffmeister* as we do not hold today that the sheer number of stab wounds alone established the elements of premeditation and deliberation. Cf. *Hoffmeister*, 394 Mich at 159 ("The brutality of a killing does not itself justify an inference of premeditation and deliberation. 'The mere fact that the killing was attended by much violence or that a great many wounds were inflicted is not relevant (on the issue of premeditation and deliberation), as such a killing is just as likely (or perhaps more likely) to have been on impulse.' ") (citation omitted).[13] Rather, we hold that the jury could reasonably infer and find from the factual record—separate and distinct from the sheer number of stab wounds alone—that defendant had an opportunity to subject his actions to a "second look" and therefore acted with premeditation and deliberation. See *Tilley*, 405 Mich at 45-46. We emphasize that the application of such principles may vary

[13] The prosecution in *Hoffmeister* conceded that the stab wounds " 'were probably [inflicted] in rapid succession . . . .' " *Hoffmeister*, 394 Mich at 159 n 4. In this case, the prosecution has made no such concession.

from case to case because the inquiry is highly dependent on the facts of each case.[14] However, the fundamental principles remain the same—sufficient evidence must exist to support each element of first-degree premeditated murder.

V. CONCLUSION

For the foregoing reasons, we conclude that the jury had sufficient evidence from which it could conclude beyond a reasonable doubt that defendant was guilty of first-degree premeditated murder. The Court of Appeals erred by holding otherwise. For this reason, we reverse Part II of the Court of Appeals opinion and reinstate defendant's first-degree premeditated murder conviction and sentence.

MARKMAN, C.J., and ZAHRA, BERNSTEIN, and CLEMENT, JJ., concurred with WILDER, J.

MCCORMACK, J. (*dissenting*). No one disputes that defendant Christopher Oros brutally murdered Marie McMillan in November 2014. Nor does anyone dispute that he did so intentionally—he admitted as much himself—when he stabbed her no fewer than 29 times. The only dispute is whether there was sufficient evidence for a jury to conclude beyond a reasonable doubt that Oros thought about killing McMillan in the specific way required by first-degree murder before deciding to act. The question is whether, viewing the evidence in the light most favorable to the prosecution and drawing all reasonable inferences in favor of the

[14] See *People v Meier*, 47 Mich App 179, 183; 209 NW2d 311 (1973) (recognizing that the circumstances in which proof of premeditation and deliberation are shown is a question without a consistent answer because no two murders, or murderers, are alike).

jury's verdict, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Oros decided to kill McMillan after premeditation and deliberation.

Bad facts, bad law.

The majority concludes that because the jury could reasonably infer that the defendant had enough time to subject his actions to a "second look," there was sufficient evidence to find beyond a reasonable doubt that he *did* premeditate and deliberate. That is, the possibility that he could have premeditated and deliberated is all that's required. In so holding, the majority treats premeditation, deliberation, and intent to kill as fungible—thereby collapsing the distinction between first- and second-degree murder—and loses sight of the burden of proof. The law demands principled distinctions between criminal offenses and proof of each element beyond a reasonable doubt. I respectfully dissent.

The standard of review for sufficiency of evidence is exceedingly deferential—a reviewing court must make all reasonable inferences to support the jury's verdict—but the verdict is not unreviewable: it "impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979). Due process requires that the prosecution prove every element beyond all reasonable doubt. *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). In a first-degree murder case, that means the prosecution must prove premeditation and deliberation beyond a reasonable doubt. "[S]ufficient proof [is] defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson*, 443 US at 316.

It requires that the prosecution put forth more than a "mere modicum" of evidence. *Id*. at 320.

To be sure, a jury can make reasonable inferences to arrive at a verdict. *Black's Law Dictionary* (10th ed) defines "inference" as "[a] conclusion reached by considering other facts and deducing a logical consequence from them." The prosecution must produce sufficient evidence to make the jury's inferences reasonable. *People v Hardiman*, 466 Mich 417, 430; 646 NW2d 158 (2002). "[T]he inferences must have support in the record and cannot be arrived at by mere speculation." *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). Thus, deference is due up to the last link in the chain of logical inferences, but not beyond that point—if the jury has to resort to speculation to reach its verdict, the prosecution has failed to carry its burden of proof. *Id*.; see also *Pennsylvania R Co v Chamberlain*, 288 US 333, 344; 53 S Ct 391; 77 L Ed 819 (1933) (providing that a jury verdict cannot "rest[] upon mere speculation and conjecture").

First-degree murder is "[m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing." MCL 750.316(1)(a). To "premeditate" is to "think about beforehand" and to "deliberate" is to "measure and evaluate the major facets of a choice or problem." *People v Bass*, 317 Mich App 241, 266; 893 NW2d 140 (2016) (quotation marks and citation omitted). It is well settled that when reading a statute, we "must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *People v Miller*, 498 Mich 13, 25; 869 NW2d 204 (2015) (quotation marks and citation omitted). Thus, a deliberate and premeditated killing requires proof beyond merely thinking twice—

the prosecutor must show that the perpetrator's thought process had the right *timing* (premeditated) and was of the right *quality* (deliberate). The two factors are, of course, correlated: the quality of thought tends to improve with time. But for the question of sufficiency of the evidence, we must consider whether the evidence allowed the jury to infer that the defendant at least thought about his intent to kill before acting on it, that there was sufficient time for a reasonable person to measure and evaluate the decision to kill (that is, time to take a "second look"), and that the defendant did, in fact, measure and evaluate the decision to kill.

Timing first: Michigan jurisprudence has emphasized that " ' "[s]ome time span between [the] initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation." ' " *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003), quoting *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979), in turn quoting *People v Hoffmeister*, 394 Mich 155, 161; 229 NW2d 305 (1975). The amount of time necessary to premeditate is "incapable of exact determination," but at a minimum, "the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a 'second look.' " *People v Vail*, 393 Mich 460, 469; 227 NW2d 535 (1975), overruled on other grounds by *People v Graves*, 458 Mich 476 (1998) (quotation marks and citation omitted).

Time to take a second look is necessary, but not sufficient, for a finding of premeditation and deliberation. The prosecution must prove first that there was sufficient time to allow the defendant to take a "second look" after forming the intent to kill and, second, that the defendant did, in fact, premeditate before acting on

the intent to kill. "[P]remeditation is a question of fact, not of law." *People v Moss*, 70 Mich App 18, 45; 245 NW2d 389 (1976) (M. J. KELLY, J., concurring in part and dissenting in part), aff'd sub nom *Tilley*, 405 Mich 38. And while such a question is not susceptible to bright-line rules, I am aware of no authority which holds that an inference that the defendant had the opportunity to premeditate has alone been sufficient evidence that he did so.[1] Rather, sufficient opportunity to take a second look is better thought of as a *precondition* for a finding of premeditation and deliberation. In short, premeditation requires some passage of time, but the passage of time does not prove premeditation, much less deliberation.

The majority asserts that "[s]econd-look law has been well established in Michigan for over 150 years . . . ." *Ante* at 243 n 9. True. And that makes it all the more puzzling that the majority has disregarded those time-honored precedents and instead fashioned a new rule: evidence that a defendant had sufficient time for a second look is—on its own—sufficient evidence to prove the elements of premedita-

[1] The prosecution cites two cases in which the jury could have inferred that the defendant had time to take a second look based on the manner of killing. In *People v Gonzalez*, we said that a slow means of death would give the defendant time to rethink his actions and could be evidence of premeditation. *Gonzales*, 468 Mich at 641-642. And the Court of Appeals, in *People v Unger*, stated that a jury could infer that the defendant had time to take a second look based on the "nature and number of a victim's wounds." *People v Unger*, 278 Mich App 210, 231; 749 NW2d 272 (2008). But neither case is helpful. Premeditation was not determined in those cases on the basis of sufficient time alone. In *Gonzalez*, the defendant visited the victim's apartment and then returned later that day to rape and murder her. And in *Unger*, the defendant murdered his wife during the pendency of their divorce by pushing her off a rooftop deck; the prosecution presented expert testimony that the victim had not died from her head injuries but had drowned after being dragged or moved into the lake.

tion *and* deliberation. The majority cites *Gonzalez*, 468 Mich at 641, and *Tilley*, 405 Mich at 45, for the proposition that "[p]remeditation and deliberation may be established by an interval of time between the initial homicidal thought and ultimate action, which would allow a reasonable person time to subject the nature of his or her action to a 'second look.' " *Ante* at 242. But this misstates the rule. *Gonzalez* held that time for a second look "*is necessary to* establish premeditation and deliberation." *Gonzalez*, 468 Mich at 641, quoting *Tilley*, 405 Mich at 45, in turn quoting *Hoffmeister*, 394 Mich at 161 (quotation marks omitted; emphasis added). Until today, we have never held that time for a second look *establishes* premeditation and deliberation. It was necessary, not sufficient.

Now it seems the opportunity to premeditate creates a rebuttable presumption of premeditation and deliberation. In effect, the majority holds that the jury can infer premeditation based on the opportunity for a second look. And inference of premeditation in turn permits the jury to infer deliberation. The burden then shifts to the defendant to prove that he did not premeditate. That's not our system.

And even if it were, proving premeditation alone is not enough. The statute requires that the prosecution establish that the premeditation was also of the requisite *quality*—namely, that the perpetrator's decision to kill was the product of deliberate thought—that he "measure[d] and evaluate[d] the major facets" of the decision to kill. *Bass*, 317 Mich App at 266 (quotation marks and citation omitted). See also 2 LaFave, Substantive Criminal Law (3d ed), § 14.7(a), pp 649-650 ("It is not easy to give a meaningful definition of the words 'premeditate' and 'deliberate' as they are usedin connection with first-degree murder. Perhaps

the best that can be said of 'deliberation' is that it requires a cool mind that is capable of reflection, and of 'premeditation' that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing.").[2]

Where the majority opinion does address deliberation as a separate element of first-degree murder, it

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[2] We have long held that deliberation requires rational thought, or a degree of calculation. Drawing on the common law, we have generally described deliberation in terms of cool rationality (versus hot emotion). " '[P]remeditation and deliberation characterize a thought process undisturbed by hot blood.' " *Vail*, 393 Mich at 468-469, quoting *People v Morrin*, 31 Mich App 301, 329-330; 187 NW2d 434 (1971).

> [M]urder is not always attended with the same degree of wicked design, or, to speak more accurately, with the same degree of malice. It may be committed in cold blood, and with much calculation, and it may be committed on a sudden impulse of passion, where the intent is formed and executed in the heat of blood, without any sufficient provocation to extenuate the degree of the offense to manslaughter. In both of these instances, and in the intermediate cases where the design is of greater or less duration, there is the actual intent to take life. [*People v Scott*, 6 Mich 287, 293 (1859).]

In *Nye v People*, 35 Mich 16, 19 (1876), we explained:

> In dividing murder into degrees, its common-law qualities are not changed, but (except in special cases) the division is chiefly between cases where the malice aforethought is deliberate and where it is not. It was rightly considered that what is done against life deliberately indicates a much more depraved character and purpose than what is done hastily or without contrivance. But it is a perversion of terms to apply the term deliberate to any act which is done on a sudden impulse.

See also *People v Martin*, 472 Mich 930, 932 (2005) (MARKMAN, J., dissenting) ("[E]ven assuming defendant did in fact shoot his father because he was 'mad,' the statement still fails to give rise to an inference of premeditation. Rather, such a statement is inconsistent with the required showing that defendant be undisturbed by hot blood."); *Tilley*, 405 Mich at 44-45 ("[W]hen a homicide occurs during a sudden affray this Court has found that it would be 'a perversion of terms to apply the term deliberate to any act which is done on a sudden impulse.' ") (citation omitted).

appears to understand it as merely acting intentionally or even voluntarily. See, e.g., *ante* at 246 ("Evidence of defendant's conflicting statements and that he was the initial aggressor allowed the jury to infer that he acted without provocation and in a cool state of mind rather than on impulse . . . ."). Of course, acting volitionally or intentionally, or even with malice, is not enough to elevate a homicide to first-degree murder; an involuntary stabbing would not be criminal at all. And the intent to kill is not unique to first-degree murder.

The rule announced today is a departure from our precedent. We rejected the sufficiency of similar evidence in *Hoffmeister*, 394 Mich 155. There, the victim's car and the defendant's car had been seen parked together off of I-96 near an exit ramp. The evidence established that the victim and the defendant had a brief encounter during which the victim was stabbed multiple times. The wounded victim drove about a quarter mile to her friend's house and then died within the hour.

We held that the nature and number of wounds, plus the fact that the defendant spent "several moments" with the victim, was not sufficient evidence to allow the jury to reasonably infer premeditation and deliberation. *Id*. at 159. We reasoned that the number of wounds and brutality was not enough to prove premeditation and deliberation, because such a killing is just as likely (or even more likely) to have been impulsive. And nothing in the record supported the theory that the defendant took a moment to measure and evaluate what he was doing. *Id*. at 159-160. "The violence and multiple wounds, while more than ample to show an intent to kill, cannot standing alone support an inference of a calmly calculated plan to kill requisite for premeditation and deliberation, as contrasted with

an impulsive and senseless, albeit sustained, frenzy." *Id*. at 160 (quotation marks and citation omitted). Moreover, although the timeline showed that the defendant and the victim were together for some time before the murder, which "le[ft] open the possibility of premeditation and deliberation," *id*. at 161, there was no evidence from which to conclude that the killing was, in fact, premeditated and deliberate; that there could have been sufficient time for deliberate thought "is not evidence that appellant actually did cogitate and mull over the intent to kill," *id*. (quotation marks and citation omitted).

The majority claims it is distinguishing *Hoffmeister*, while announcing a standard that effectively overrules it. *Hoffmeister* held that evidence is insufficient when it merely leaves open the possibility of premeditation and deliberation. Now the opposite is true with no stare decisis analysis and no explanation for the dislocation of that precedent.

Here, like in *Hoffmeister*, the evidence—at most—permitted the jury to infer that the defendant may have had sufficient time to reflect. From there, the jury could only speculate whether he engaged in deliberate thought before deciding to act. The victim and the defendant were not previously acquainted. And the violence and multiple wounds cannot, on their own, support the inference of premeditation and deliberation. We know that from *Hoffmeister*. The gruesome physical evidence allowed the jury to infer a single fact—that the defendant might have had sufficient time to take a second look. But beyond that, the jury could only speculate between two possibilities: either the defendant did premeditate and deliberate, or he did not. The determination is no better than a coin flip. That's not proof beyond a reasonable doubt.

The majority's blow-by-blow account of its theory of the murder fails to identify any evidence from which to infer that the defendant thought about his intent to kill before deciding to act. For example, even resolving conflicting evidence in favor of the prosecution, the majority's conclusion that the defendant was the initial aggressor is relevant only to a lack of adequate provocation. This might be helpful if the dispute were between voluntary manslaughter and second-degree murder, because "provocation is not an element of voluntary manslaughter. Rather, provocation is the circumstance that negates the presence of malice." *People v Mendoza*, 468 Mich 527, 536; 664 NW2d 685 (2003) (citation omitted). But both first- and second-degree murder share the element of malice. That the defendant acted with malice is beside the point.

First principles in the elements of each level of homicide are important. Every murder involves at least two elements: the killing of a living person with malice aforethought. *Maher v People*, 10 Mich 212, 218 (1862).[3] The killing of another is the *actus reus*, and malice aforethought is the *mens rea*, or "guilty mind." 1 LaFave, Substantive Criminal Law (3d ed), § 5.1, p 446. Second-degree murder requires acting with one of three forms of malice aforethought: intent to kill, intent to do serious bodily injury, or a depraved heart. 2 LaFave, § 14.1, p 566. First-degree murder requires not only that the perpetrator intend to kill, but also that he premeditated the killing and deliberated about it. *Id*. at § 14.7(a), p 649. Therefore, intent-to-kill

[3] And "aforethought" is somewhat superfluous "since malice need exist only at the time the homicidal act is committed . . . . Nevertheless, statutes still use the language 'malice aforethought' to define murder, the apparent intent being to incorporate by reference the vast body of law that has been developed over the centuries." 2 Wharton's Criminal Law (15th ed), § 139, p 246.

murder without the added elements of premeditation and deliberation can only be second-degree murder. *Id*. at § 14.7(e), p 664.[4] Thus, even textbook second-degree murder involves some amount of "thought," in the sense that the perpetrator intends to kill and acts on it. In short, the defendant's admission that he intended to kill McMillan means that he must be guilty of murder. But it tells us nothing about when, how, or why he decided to act on his intent to kill—the variables the prosecution needed to fill in to assign first- or second-degree culpability to the murder.[5]

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[4] Michigan does not have some outlier statutory approach; we are in full accordance with the scholarly treatises. See *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984); *People v Aaron*, 409 Mich 672, 713-714; 299 NW2d 304 (1980); Gillespie, Michigan Criminal Law & Procedure, Practice Deskbook (2d ed), §§ 5:255-5:258, 5:273, pp 264-265, 267; 2 Wharton's Criminal Law, §§ 139, 142, pp 243-247, 257-278.

[5] The majority cites *People v Holmes*, 111 Mich 364, 372; 69 NW 501 (1896), to support its claim that evidence that the defendant was the initial aggressor permits the jury to infer premeditation and deliberation. But the excerpt the majority cites from *Holmes* is, in fact, quoting *Scott*, 6 Mich at 295. *Scott*'s holding, however, concerned the elements required to prove assault with intent to murder, so it's dubious whether the quoted language parses the differences between first- and second-degree murder. And the quotation is taken out of context. Immediately before the majority's quoted text, the *Scott* Court makes clear that it is discussing whether a homicide triggered by *inadequate* provocation should be murder or manslaughter:

> Voluntary manslaughter often involves a direct intent to kill, but the law reduces the grade of the offense because, looking at the frailty of human nature, it considers great provocations sufficient to excite the passions beyond the control of reason. But provocations often arise which are of less intensity, and are not in law regarded as sufficient to reduce the crime to manslaughter. If it appears that murder is committed upon a heat of passion engendered entirely by such provocations, and suddenly conceived, such a murder can not properly be called deliberate. But whenever murder is intentionally committed without serious provocation, and under circumstances which do not reasonably account for such an excitement of passion as naturally deprives men of

The majority also suggests that the "location and depth of the victim's stab wounds support an inference that defendant thought about, measured, and evaluated his options." *Ante* at 248. And indeed, it may be permissible to infer premeditation and deliberation when "the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design." 2 LaFave, § 14.7(a), p 653.[6] Thus, the question here is whether the jury could reasonably infer that the defendant's admittedly intentional actions were deliberate and calculated based on some special quality of the physical evidence. The majority vaguely refers to the "location" of the wounds, as well as to the force required to inflict them, as evidence that permitted the jury to infer both premeditation and deliberation. *Ante* at 248-249. But the majority itself recognizes that this shows nothing more than the opportunity for a second look. I don't know how that evidence is any different in quality from the evidence in *Hoffmeister*, in which we held that the evidence "le[ft] open the possibility of premeditation and deliberation" but found no basis in the record to conclude that the defendant actually took a second look. *Hoffmeister*, 394 Mich at 161.

> deliberation, common experience teaches us that such an act is wanton, and its perpetrator responsible for it, as in other cases of cold-blooded crime. The time within which a wicked purpose is formed is immaterial, provided it is formed without disturbing excitement. [*Scott*, 6 Mich at 295.]

[6] Inferring premeditation and deliberation from "the manner of killing . . . require[s] . . . evidence (usually based upon examination of the victim's body) showing that the wounds were deliberately placed at vital areas of the body. The mere fact that the killing was attended by much violence or that a great many wounds were inflicted is not relevant in this regard, as such a killing is just as likely (or perhaps more likely) to have been on impulse." 2 LaFave, § 14.7(a), pp 655-656, citing *Hoffmeister*, 394 Mich 155.

The majority's decision today makes the difference between first- and second-degree murder hard to discern. And the statute is not the problem. "Close cases can be imagined under virtually any statute" and are "addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *United States v Williams*, 553 US 285, 306; 128 S Ct 1830; 170 L Ed 2d 650 (2008). But the majority's gloss so blurs the line between first- and second-degree murder that it renders vague an otherwise clear statute. See *Grayned v City of Rockford*, 408 US 104, 108-109; 92 S Ct 2294; 33 L Ed 2d 222 (1972) ("[L]aws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.") (citation omitted). When there is no distinction in the proof required for each crime, the guarantee that "close cases" must be proved beyond a reasonable doubt is hollow. If intent to kill plus any time window during which one could have accomplished premeditation and deliberation now amounts to proof beyond a reasonable doubt, then I find it hard to imagine what second-degree murder wouldn't also be a first-degree murder. That can't be constitutional.[7]

There are few principles of federal constitutional

[7] Indeed, the Arizona Supreme Court held that it was duty-bound to reject as unconstitutionally vague the same reading of its murder statute that the majority adopts today:

> We conclude, as did the court of appeals, that if the only difference between first and second degree murder is the mere passage of time, and that length of time can be "as instantaneous as successive thoughts of the mind," then there is no meaningful distinction between first and second degree murder. Such an interpretation would relieve the state of its burden to prove actual reflection and would render the first degree murder statute

law more clearly established than the accused's protection against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 US at 364. And "[t]he constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." *Jackson*, 443 US at 323-324 (citation omitted). So too even a heinous killer.

As I said at the start, this was a brutal crime. But even in cases involving the most horrific facts, courts

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impermissibly vague and therefore unconstitutional under the United States and Arizona Constitutions.

. . . While the phrase "proof of actual reflection is not required" can be interpreted in a way that relieves the state of the burden of proving reflection, such an interpretation would not pass constitutional scrutiny, and the legislature could not have intended such a result. Accordingly, we conclude that the legislature intended to relieve the state of the burden of proving a defendant's thought processes by direct evidence. It intended for premeditation, and the reflection that it requires, to mean more than the mere passage of time.

We find support for our interpretation in the admonition that "an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion." This language distinguishes impulsive killings from planned or deliberated killings and confirms the legislature's intent that premeditation be more than just a snap decision made in the heat of passion.

Our decision today distinguishes the *element* of premeditation from the *evidence* that might establish that element. Although the mere passage of time suggests that a defendant premeditated—and the state might be able to convince a jury to make that inference—the passage of time is not, in and of itself, premeditation. To allow the state to establish the element of premeditation by merely proving that sufficient time passed to permit reflection would be to essentially relieve the state of its burden to establish the sole element that distinguishes between first and second degree murder. [*State v Thompson*, 204 Ariz 471, 478; 65 P3d 420 (2003) (en banc) (citations omitted).]

try cases and not people, and in each and every case the Constitution requires proof beyond a reasonable doubt of every element. Shortcuts are tempting, but the rule of law doesn't allow them. There is simply no basis in the evidence to infer proof beyond a reasonable doubt that the defendant's decision to kill McMillan was premeditated and deliberated. The Court of Appeals was correct. I would affirm.

VIVIANO, J., concurred with MCCORMACK, J.

PEOPLE v BARNES

Docket No. 156060. Decided July 9, 2018.

In 2002, Timothy Barnes was convicted of second-degree murder, MCL 750.317, and other offenses. On direct appeal, the Court of Appeals affirmed his convictions and the Supreme Court denied leave to appeal. In 2008, defendant moved in the trial court for relief from judgment, and the trial court denied the motion. The Court of Appeals and the Supreme Court denied leave to appeal. After this Court's decision in *People v Lockridge*, 498 Mich 358 (2015), defendant again moved for relief from judgment in the Wayne Circuit Court under MCR 6.502(G)(2), arguing that because his sentence was imposed when the legislative sentencing guidelines were mandatory, he should be resentenced in light of *Lockridge*, which held that the guidelines are now only advisory. The court, Mark T. Slavens, J., denied the motion, and defendant appealed. The Court of Appeals dismissed the delayed application for leave to appeal under MCR 6.502(G)(1), reasoning that no appeal may be taken from the denial or rejection of a successive motion for relief from judgment. Defendant applied for leave to appeal in the Supreme Court.

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

The new rules of law regarding sentencing announced in *Lockridge* and *Alleyne v United States*, 570 US 99 (2013)—the decision on which the *Lockridge* decision was based—apply prospectively only in state collateral review proceedings.

1. In general, judicial decisions that express new rules are not applied retroactively to other cases that have become final; accordingly, new rules are generally not applied to criminal cases receiving collateral review. However, in some circumstances, a new rule of law will be applied retroactively to a criminal case receiving collateral review. Under MCR 6.502(G)(2), a defendant may file a second or subsequent motion for relief from judgment based on a retroactive change in law that occurred after the first motion for relief from judgment. There are separate federal and

state tests for determining whether a new rule of law should be applied retroactively to a case on collateral review.

2. Under federal retroactivity jurisprudence, a new legal rule may be applied on collateral review to an otherwise closed case when the rule involves (1) a new substantive rule of constitutional law—that is, a rule forbidding certain primary conduct or a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense—or (2) a new watershed rule of criminal procedure that implicates the fundamental fairness and accuracy of the criminal proceeding. A case announces a new rule when it breaks new ground or imposes a new obligation on the states or the federal government; a new rule is one not dictated by then-existing precedent. In this case, *Lockridge* articulated a new rule of law. The *Lockridge* decision was based on *Alleyne*, which had overruled existing precedent, indicating that *Alleyne* also established a new rule of law. However, the *Alleyne* decision did not create a substantive rule of constitutional law because it did not apply to primary conduct or to a particular class of defendant; instead, the new rule adjusted how the sentencing process functions once any defendant is convicted of a crime. The *Alleyne* rule was not a new watershed rule of criminal procedure because the rule did not implicate the accuracy of a defendant's conviction; instead, the *Alleyne* rule established a procedural rule related to the sentencing process that was entitled to prospective application only. Accordingly, the new rule of law announced in *Alleyne* was not entitled to retroactive application under federal law.

3. But the remedy a state court chooses to provide its citizens for violations of the federal Constitution is primarily a question of state law. To determine whether a new rule of law applies retroactively in Michigan on collateral review, courts must consider: (1) the purpose of the new rule, (2) the general reliance on the old rule, and (3) the effect on the administration of justice. The new rule announced in *Lockridge* was not relevant to the ascertainment of guilt or innocence of a defendant and did not implicate the integrity of the fact-finding process, making it amenable to prospective application only. Moreover, the bench and bar manifestly relied on the mandatory sentencing guidelines from 1999 until the *Lockridge* decision in 2015, meaning there would be an incalculable effect on the administration of justice if the *Lockridge* rule were extended retroactively on collateral review. In light of these state retroactivity factors, *Lockridge* applied prospectively only on collateral review. In this case, because the new rules of law in *Alleyne* and *Lockridge* applied

prospectively only on collateral review, the trial court correctly denied defendant's motion for relief from judgment for failing to articulate a retroactive change in law that could be applied to his case.

Affirmed.

SENTENCING — SENTENCING GUIDELINES — COLLATERAL REVIEW — NEW RULE OF LAW APPLIED PROSPECTIVELY ONLY.

The new rules of law regarding sentencing announced in *People v Lockridge*, 498 Mich 358 (2015), and *Alleyne v United States*, 570 US 99 (2013)—the decision on which the *Lockridge* decision was based—apply prospectively only in state collateral review proceedings.

Timothy L. Barnes *in propria persona*.

PER CURIAM. In 2002, defendant Timothy Barnes was convicted of second-degree murder, MCL 750.317, and other offenses. On direct appeal, the Court of Appeals affirmed his convictions, and this Court denied leave to appeal. *People v Barnes*, 472 Mich 866 (2005). In 2008, defendant moved in the trial court for relief from judgment. The trial court denied the motion. The Court of Appeals and this Court denied leave to appeal. *People v Barnes*, 488 Mich 869 (2010). Defendant has now filed another motion for relief from judgment, arguing that, because his sentence was imposed when the legislative sentencing guidelines were mandatory, he should be resentenced now that this Court has held in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), that the guidelines are advisory only.[1] Ordinarily, successive motions for relief from judgment are barred by MCR 6.502(G)(1), which allows, "after August 1, 1995, one and only one motion for relief from

[1] Even if defendant's argument that *Lockridge* applies to his sentence were correct, he would only be entitled to a remand to the trial court for *possible* resentencing. See *Lockridge*, 498 Mich at 395-399, citing *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005).

judgment [to] be filed with regard to a conviction." The trial court denied defendant's motion on that basis. On appeal, defendant argues that the trial court erred and that his motion falls within one of the exceptions in MCR 6.502(G)(2), which allows a "subsequent motion [for relief from judgment] based on a retroactive change in law that occurred after the first motion for relief from judgment . . . ." As explained in this opinion, *Lockridge* does not have retroactive effect for sentences receiving collateral review under MCR 6.500, and so we affirm.

Ordinarily, "judicial decisions are to be given complete retroactive effect." *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). But judicial decisions which express new rules normally are not applied retroactively to other cases that have become final. "New legal principles, even when applied retroactively, do not apply to cases already closed," because "at some point, 'the rights of the parties should be considered frozen' and a 'conviction . . . final.' " *Reynoldsville Casket Co v Hyde*, 514 US 749, 758; 115 S Ct 1745; 131 L Ed 2d 820 (1995), quoting *United States v Estate of Donnelly*, 397 US 286, 296; 90 S Ct 1033; 25 L Ed 2d 312 (1970) (Harlan, J., concurring). Thus, as to those cases that have become final, the general rule allows only prospective application. However, there are "certain special concerns—related to collateral review of state criminal convictions—that affect" how courts determine whether a case should be considered closed. *Reynoldsville Casket Co*, 514 US at 758. In essence, these "special concerns" amount to exceptions to the general rule of nonretroactivity for closed cases, allowing a new legal rule to be applied on collateral review to an otherwise closed case. Both federal and state rules govern the retroactive applica-

tion of new legal principles to criminal cases that are otherwise final but subject to collateral review.

The federal standard for retroactivity under these circumstances was most recently laid out in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718, 728; 193 L Ed 2d 599 (2016):

> Justice O'Connor's plurality opinion in *Teague v. Lane*, 489 U.S. 288[; 109 S Ct 1060; 103 L Ed 2d 334] (1989), set forth a framework for retroactivity in cases on federal collateral review. Under *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced. *Teague* recognized, however, two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include "rules forbidding criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330[; 109 S Ct 2934; 106 L Ed 2d 256] (1989); see also *Teague*, [489 US] at 307. . . . Second, courts must give retroactive effect to new " ' "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.' " [*Schriro v Summerlin*, 542 US 348, 352; 124 S Ct 2519; 159 L Ed 2d 442 (2004)]; see also *Teague*, 489 U.S. at 312-313.

"Thus, the first question under *Teague* is whether the rule in [*Lockridge*] constitutes a new rule." *People v Maxson*, 482 Mich 385, 388; 759 NW2d 817 (2008). In *Maxson*, we surveyed the caselaw to summarize how to go about identifying a "new rule":

> "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Penry v Lynaugh*, 492 US 302, 314; 109 S Ct 2934; 106 L Ed 2d 256 (1989) (citation omitted). Deciding whether a rule is "new" requires a court to determine

> "whether 'a state court considering [the defendant's] claim at the time his conviction became final would have felt *compelled* by existing precedent to conclude that the rule [he] seeks was required by the Constitution.' " *O'Dell v Netherland*, 521 US 151, 156; 117 S Ct 1969; 138 L Ed 2d 351 (1997) (emphasis added and citations omitted). If a reasonable jurist would not have felt compelled by existing precedent, then the rule is new. *Beard v Banks*, 542 US 406, 413; 124 S Ct 2504; 159 L Ed 2d 494 (2004). In other words, the relevant question is not simply whether existing precedent might have *supported* the rule, but whether the rule "was *dictated* by then-existing precedent." *Id*. at 413 (emphasis in original). [*Maxson*, 482 Mich at 388-389 (quotation marks omitted; alterations in original).]

We conclude that *Lockridge* articulated a new rule under this standard. *Lockridge* itself was based on *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013). In *Alleyne*, *id*. at 103, the Supreme Court of the United States overruled its previous decision in *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), so *Alleyne* clearly was not compelled by existing precedent. And we have previously stated that *Alleyne* established a new rule of law, albeit not while reviewing whether our *Lockridge* rule applies retroactively. See *People v Carp*, 496 Mich 440, 491; 852 NW2d 801 (2014) ("[Defendant's] argument relies on the new rule adopted in *Alleyne* . . . ."). Our decision in *Carp* was vacated on unrelated grounds, *Davis v Michigan*, ___ US ___; 136 S Ct 1356 (2016), but we agree with the several federal courts that have concluded that *Alleyne* articulated a new rule.[2]

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[2] See *Butterworth v United States*, 775 F3d 459, 465 (CA 1, 2015) ("Our conclusion that *Alleyne* was a new rule brings us into accord with the other circuit courts to have decided the issue."); *United States v Reyes*, 755 F3d 210, 212 (CA 3, 2014) ("[T]oday we clarify that *Alleyne* did indeed announce a new rule."); *In re Payne*, 733 F3d 1027, 1029 (CA

Having established that *Alleyne* created a new rule of law, we must determine whether either of the exceptions to the general rule of prospective-only application is applicable to this criminal case receiving collateral review. The first exception is whether the rule is a "substantive rule of constitutional law," defined as a rule forbidding certain primary conduct or a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense. *Montgomery*, 577 US at ___; 136 S Ct at 728. The rule here does not satisfy this exception because it applies neither to primary conduct nor to a particular class of defendants but rather adjusts how the sentencing process functions once any defendant is convicted of a crime. The second exception is whether the new rule is a "watershed rule" of criminal procedure. *Id*. at ___; 136 S Ct at 728. "In order to qualify as watershed, a new rule must . . . be necessary to prevent an impermissibly large risk of an inaccurate conviction . . . [and] alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v Bockting*, 549 US 406, 418; 127 S Ct 1173; 167 L Ed 2d 1 (2007), quoting *Schriro*, 542 US at 356 (quotation marks omitted). The rule here does not

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10, 2013) ("*Alleyne* actually does set forth a new rule of constitutional law . . . .") (quotation marks and citation omitted); *Simpson v United States*, 721 F3d 875, 876 (CA 7, 2013) ("*Alleyne* establishes a new rule of constitutional law."). See also *Commonwealth v Washington*, 636 Pa 301, 314; 142 A3d 810 (2016) ("There is presently no controversy concerning the proposition that *Alleyne* sets forth a new rule of constitutional law."); *State v Large*, 234 Ariz 274, 280; 321 P3d 439 (Ariz App, 2014) ("*Alleyne* presented a new rule of constitutional law."). Several federal courts have decided not to decide whether *Alleyne* established a "new rule" for purposes of retroactivity analysis. See *In re Sams*, 830 F3d 1234, 1241 (CA 11, 2016); *Walker v United States*, 810 F3d 568, 574 (CA 8, 2016); *Hughes v United States*, 770 F3d 814, 819 (CA 9, 2014); *In re Mazzio*, 756 F3d 487, 489 n 2 (CA 6, 2014); *United States v Redd*, 735 F3d 88, 91 (CA 2, 2013).

satisfy this exception either, because it has *nothing* to do with the accuracy of a conviction.[3] Our conclusion that *Alleyne* is not entitled to retroactive application under the *Teague* framework is consistent with our remarks in *Carp*, 496 Mich at 491, that we were not "persuaded" "that *Alleyne* established a substantive rule entitled to retroactive application," meaning we "treat[ed] the rule in *Alleyne* as a procedural rule entitled only to prospective application." As noted, *Carp* was vacated on unrelated grounds, but federal courts have also consistently held that *Alleyne* is only prospective.[4]

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[3] It is also worth noting that since *Teague*, the Supreme Court of the United States "ha[s] rejected every claim that a new rule satisfied the requirements for watershed status." *Whorton*, 549 US at 418. "Although the precise contours of this exception may be difficult to discern, [the Supreme Court of the United States has] usually cited *Gideon v Wainwright*, 372 US 335[; 83 S Ct 792; 9 L Ed 2d 799] (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception." *Saffle v Parks*, 494 US 484, 495; 110 S Ct 1257; 108 L Ed 2d 415 (1990).

[4] See *United States v Olvera*, 775 F3d 726, 730 (CA 5, 2015); *Butterworth*, 775 F3d at 468 ("We therefore conclude that the rule announced in *Alleyne* is not retroactively applicable to sentences on collateral review . . . ."); *Hughes*, 770 F3d at 819 ("The Supreme Court did not make *Alleyne* expressly retroactive, and Hughes has not shown that it was made retroactive by multiple Supreme Court holdings."); *United States v Hoon*, 762 F3d 1172, 1173 (CA 10, 2014) ("No court has treated *Alleyne* as retroactive to cases on collateral review. . . . This holding could not be questioned by any reasonable jurist."); *Jeanty v Warden, FCI-Miami*, 757 F3d 1283, 1285 (CA 11, 2014) ("*Alleyne* does not apply retroactively on collateral review."); *Mazzio*, 756 F3d at 491 ("*Alleyne* does not fall into either *Teague* exception because it is not a substantive rule and it also does not meet the high standard for new rules of criminal procedure."); *United States v Winkelman*, 746 F3d 134, 136 (CA 3, 2014) ("[W]e now hold that *Alleyne* cannot be applied retroactively to cases on collateral review."); *Redd*, 735 F3d at 92 ("*Alleyne* did not announce a new rule of law made retroactive on collateral review."). See also *Commonwealth v Riggle*, 119 A3d 1058, 1067; 2015 PA Super 147 (2015)

Yet the fact that *Alleyne* (on which *Lockridge* was based) does not apply retroactively on collateral review does not end the analysis. "[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." *Danforth v Minnesota*, 552 US 264, 288; 128 S Ct 1029; 169 L Ed 2d 859 (2008). Consequently, we must also consider whether our *Lockridge* decision applies retroactively on state-law grounds. Our state-law test was set out in *People v Hampton*, 384 Mich 669; 187 NW2d 404 (1971).[5] We consider: "(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice."[6] As to purpose, the new rule "is not relevant to the ascertainment of guilt or innocence and does not implicate the integrity of the fact-finding process," meaning "it is amenable to prospective application."[7] *People v Sexton*,

("*Alleyne* . . . is not substantive. Nor does *Alleyne* constitute a watershed procedural rule."); *United States v Stewart*, 540 F Appx 171, 172 n * (CA 4, 2013) ("*Alleyne* has not been made retroactively applicable to cases on collateral review."); *Simpson*, 721 F3d at 876 ("[T]he decision [on retroactivity] is the Supreme Court's, not ours, to make. Unless the Justices themselves decide that *Alleyne* applies retroactively on collateral review, we cannot authorize a successive collateral attack . . . .").

[5] The state-law test in *Hampton* was derived from *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965). *Linkletter* was subsequently disavowed as the federal standard for retroactivity in *Griffith v Kentucky*, 479 US 314; 107 S Ct 708; 93 L Ed 2d 649 (1987), but we recognized the *Hampton/Linkletter* standard's continued viability as the state-specific standard in *People v Sexton*, 458 Mich 43, 60-61; 580 NW2d 404 (1998).

[6] It is worth noting that "[t]he second and third factors can be dealt with together, because the amount of past reliance will often have a profound effect upon the administration of justice." *Hampton*, 384 Mich at 677.

[7] While we conclude that all of the state retroactivity factors support prospective application only, we note that when the first factor "strongly supports one side or the other of the retroactivity question," it is to be afforded "heightened weight," meaning "the second and third factors

458 Mich 43, 62-63; 580 NW2d 404 (1998). Moreover, it is manifest that there was widespread, indeed statewide, reliance by the bench and bar[8] on the mandatory sentencing guidelines scheme, which was applied by legislative dictate to almost all felonies in Michigan from January 1, 1999, MCL 769.34(2), until our *Lockridge* decision. As we acknowledged in *Lockridge*, 498 Mich at 372, this Court had expressly held in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), that *Alleyne*'s predecessors "did not apply to Michigan's sentencing scheme at all," and until *Lockridge* was decided, there was no reason not to continue applying the mandatory sentencing guidelines. Because of this general reliance on the old rule, the effect on the administration of justice to extend the *Lockridge* rule retroactively on collateral review would be incalculable, with potentially every criminal defendant sentenced in at least the last 19 years being eligible for relief. Consequently, we hold that *Lockridge* will be given only prospective application on collateral review.

Defendant's conviction became final for purposes of appellate review over 10 years before *Lockridge* was decided. Because neither *Alleyne* nor *Lockridge* qualifies for the extraordinary remedy of retroactive application to cases on collateral review, we affirm the trial court's decision to deny defendant's motion for relief from

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would need to favor retroactive application to a substantial degree" to overcome the first factor. *Carp*, 496 Mich at 502-503, citing *Michigan v Payne*, 412 US 47, 55; 93 S Ct 1966; 36 L Ed 2d 736 (1973).

[8] Defendant in his application makes no argument whatsoever about his own reliance on the old rule. "To be considered to have detrimentally relied on the old rule, a defendant must have relied on the rule . . . and have suffered harm as a result of that reliance." *Maxson*, 482 Mich at 394. Defendant shows no reliance at all, let alone *detrimental* reliance, on the old rule.

judgment for failing to articulate a retroactive change in law that can be applied to his case.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred.

MCQUEER v PERFECT FENCE COMPANY

Docket No. 153829. Argued on application for leave to appeal April 12, 2018. Decided July 10, 2018.

David J. McQueer brought a negligence action in the Grand Traverse Circuit Court against his employer, Perfect Fence Company, to recover damages after he was injured on the job. Defendant moved for summary disposition on the ground that the exclusive-remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., barred plaintiff's action. Plaintiff responded that his action was not barred because defendant had violated MCL 418.611 by failing to procure workers' compensation coverage for him and had violated MCL 418.171 by encouraging him to pose as a nonemployee. Plaintiff additionally moved to amend his complaint to add claims of intentional tort and breach of an employment contract. Plaintiff argued that the evidence raised a question of fact about whether defendant intended to injure him in a way that brought plaintiff's claim within the scope of the intentional-tort exception to the exclusive-remedy provision of the WDCA. The trial court, Thomas G. Power, J., granted defendant's motion for summary disposition under MCR 2.116(C)(10), concluding that defendant had not violated MCL 418.611 because defendant had provided workers' compensation coverage. The court also ruled that MCL 418.171 was not applicable to plaintiff's claims. The court denied plaintiff's motion to amend his complaint, concluding that amendment would be futile because the undisputed facts did not demonstrate that defendant intended to injure plaintiff. Plaintiff appealed. The Court of Appeals, HOEKSTRA and SHAPIRO, JJ. (TALBOT, C.J., concurring), reversed the trial court's grant of summary disposition and denial of plaintiff's motion to amend his complaint in an unpublished per curiam opinion issued April 19, 2016 (Docket No. 325619). The panel agreed with the trial court that defendant had not violated MCL 418.611, but it concluded that plaintiff had established a question of fact regarding whether defendant had improperly encouraged him to pose as a contractor for the purpose of evading liability under the WDCA in violation of MCL 418.171(4). The panel also concluded that because plaintiff had presented sufficient evidence to create a question of fact regarding whether an

intentional tort had occurred, the trial court abused its discretion by not allowing plaintiff to amend his complaint. Defendant sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 501 Mich 954 (2018).

In an opinion by Justice ZAHRA, joined by Chief Justice MARKMAN and Justices VIVIANO and WILDER, the Supreme Court, in lieu of granting leave to appeal, *held*:

In limited circumstances, MCL 418.171(4) provides a civil remedy to an employee of a contractor engaged by a principal. Because plaintiff was not the employee of a contractor engaged by defendant, he had no cause of action under MCL 418.171. The part of the Court of Appeals judgment pertaining to MCL 418.171 was reversed.

1. MCL 418.131(1) provides that the right to recover workers' compensation benefits under the WDCA is an employee's exclusive remedy against the employer for a personal injury. However, MCL 418.641(2) provides an exception to MCL 418.131(1) for cases in which an employer violates MCL 418.171. MCL 418.171(1) provides that if "any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act . . . and who does not become subject to this act . . . prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal." MCL 418.171(3) provides that MCL 418.171 applies to a principal and contractor only if the contractor engages persons to work other than persons who would not be considered employees under MCL 418.161(1)(d). MCL 418.171(4) provides that principals willfully acting to circumvent the provisions of MCL 418.171 or MCL 418.611 by using coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees within the meaning of the WDCA to pose as contractors for the purpose of evading MCL 418.171 or the requirements of MCL 418.611 shall be liable subject to the provisions of MCL 418.641.

2. The Court of Appeals erred by considering the civil-remedy provision of MCL 418.171(4) in isolation rather than reading MCL 418.171 as a whole. MCL 418.171(1) sets forth a statutorily imposed employment relationship under which an employer

assumes the role of a principal by contracting with a contractor for the performance of any work. The principal becomes liable for the payment of workers' compensation benefits to any person employed by the contractor for injuries sustained while performing any work on behalf of the principal, provided that the contractor is either not subject to the WDCA or has failed to obtain adequate insurance as required by the WDCA. MCL 418.171(1) thus creates a tripartite employment relationship among the principal, the contractor, and the contractor's employees. MCL 418.171(3) provides that MCL 418.171 applies to a principal and contractor only if the contractor engages employees, as defined elsewhere in the WDCA. The qualifying language "only if" limits the applicability of the entire section, including Subsection (4). In this case, plaintiff was a direct employee of defendant, not an employee of a contractor, and therefore no tripartite employment relationship existed. Accordingly, the requirements of Subsection (3) were not met, and plaintiff could not seek the civil remedy under Subsection (4).

3. The Court of Appeals failed to give proper meaning to the term "principal," which has a specialized meaning under MCL 418.171 and is not interchangeable with the term "employer." MCL 418.171(1) designates the "principal" as an employer who contracts with a contractor that does not have adequate workers' compensation coverage for its employees. Accordingly, not all employers are principals under the statutory-employer provision. Further, MCL 418.171(1) states that a principal can be liable to pay the compensation that it would have been liable to pay if that person, the contractor's employee, had been immediately employed by the principal. In other words, the principal is not the employee's actual employer; the principal is merely deemed to be the employer for certain purposes. To read "principal" as being equivalent with "employer" would render the statutory requirements under Subsection (1) superfluous. The principal may have its own employees, but those employees are not the protected parties under MCL 418.171. Under MCL 418.171, the principal may become the statutory employer only for purposes of providing workers' compensation benefits to the contractor's employees. The civil-remedy provision in MCL 418.171(4) only applies to principals willfully acting to circumvent MCL 418.171 or MCL 418.611 by encouraging employees to pose as contractors. Because defendant had not contracted with a contractor with inadequate workers' compensation coverage for its own employees, defendant was not a "principal" for purposes of the statutory-employer provision and the civil-remedy provision under MCL 418.171(4) did not apply.

Court of Appeals judgment reversed in part; application for leave to appeal denied in part.

Justice ZAHRA, joined by Chief Justice MARKMAN and Justice WILDER, concurred in full with the majority opinion but wrote separately to dissent from the Court's decision not to address defendant's claim regarding plaintiff's motion to amend his complaint. Defendant argued in his application for leave to appeal that the Court of Appeals erred by reversing the trial court's denial of plaintiff's motion to amend his complaint to allege that defendant had committed an intentional tort, which is an express exception to the exclusive-remedy provision of the WDCA. The WDCA provides that an intentional tort exists only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury, and plaintiff failed to present evidence that defendant either had a specific intent to injure him or had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. Therefore, Justice ZAHRA would have held that the trial court's decision to reject plaintiff's motion to amend his complaint was not an abuse of discretion. Justice ZAHRA would have fully reversed the Court of Appeals' judgment and reinstated the trial court's orders granting summary disposition in favor of defendant and denying plaintiff's motion to amend his complaint.

Justice CLEMENT, joined by Justices MCCORMACK and BERNSTEIN, concurring in part and dissenting in part, agreed with the majority's decision to deny leave to appeal regarding the remaining issues, but disagreed with its conclusion that MCL 418.171(4) provides a civil remedy only to an employee of a contractor engaged to a principal. She stated that because MCL 418.171(4) refers to "principals," who are defined in MCL 418.171(1) as "any employer subject to the provisions of this act," the plain language of the statute supported an interpretation of a "principal" as any employer subject to the WDCA, and defendant fit that definition. She also noted that MCL 418.171(4) refers to "employees within the meaning of this act" rather than to persons engaged to work by a contractor, which further indicated that a tripartite relationship was not required for the imposition of liability under MCL 418.171(4). Accordingly, Justice CLEMENT dissented from the reversal of the Court of Appeals' decision as to MCL 418.171(4), and she would have affirmed the Court of Appeals' holding that the trial court erred by granting summary disposition to defendant because plaintiff raised a genuine issue of material fact as to whether defendant willfully acted to circumvent the provisions of

MCL 418.171 or MCL 418.611 by encouraging plaintiff, who acted as a full-time employee, to pose as an independent contractor.

1. WORKERS' COMPENSATION — EXCLUSIVE REMEDY — EXCEPTIONS — STATUTORY EMPLOYERS.

Under MCL 418.131(1), the right to recover workers' compensation benefits is an employee's exclusive remedy against the employer for a personal injury; MCL 418.171(4) provides an exception to the exclusive-remedy provision for cases in which a principal willfully acts to circumvent the provisions of MCL 418.171 or MCL 418.611 by using coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees within the meaning of the Worker's Disability Compensation Act to pose as contractors for the purpose of evading MCL 418.171 or the requirements of MCL 418.611; a plaintiff who is not an employee of a contractor engaged by a principal may not pursue a civil remedy under MCL 418.171(4) (MCL 418.101 *et seq*.).

2. WORKERS' COMPENSATION — EXCLUSIVE REMEDY — EXCEPTIONS — STATUTORY EMPLOYERS — WORDS AND PHRASES — "PRINCIPAL."

The term "principal" has a specialized meaning under MCL 418.171 and is not interchangeable with the term "employer"; MCL 418.171(1) designates the "principal" as an employer who contracts with a contractor that does not have adequate workers' compensation coverage for its employees.

Mark Granzotto, PC (by *Mark Granzotto*) and *Parsons Law Firm PLC* (by *Grant W. Parsons*) for plaintiff.

Garan Lucow Miller, PC (by *John E. McSorley*, *David M. Shafer*, and *Christian C. Huffman*) for defendant.

Amici Curiae:

Conklin Benham, PC (by *Martin L. Critchell*) for the Inland Press Company.

Conklin Benham, PC (by *Martin L. Critchell*) for the Michigan Self-Insurers' Association.

ZAHRA, J. Plaintiff, David J. McQueer, was injured in the scope of his employment and is now receiving benefits pursuant to the Worker's Disability Compensation Act (WDCA).[1] Plaintiff brought this action against Perfect Fence Company, his employer, to recover tort damages. Plaintiff maintains, among other things, that defendant is liable under MCL 418.171(4) because defendant used "coercion, intimidation, deceit, or other means to encourage [plaintiff] who would otherwise be considered [an] employee[] within the meaning of this act to pose as [a] contractor[] for the purpose of evading" liability under §§ 171 or 611 of the WDCA. The trial court dismissed plaintiff's action, concluding that MCL 418.171(4) was not applicable to plaintiff's claims. The Court of Appeals reversed, concluding that MCL 418.171(4) was applicable and that plaintiff had established a genuine question of material fact under that provision. We hold that MCL 418.171 does not apply in this case. In limited circumstances, § 171(4) provides a civil remedy to an employee of a contractor engaged by a principal. Because plaintiff is not the employee of a contractor engaged by defendant, he has no cause of action under MCL 418.171.

For this reason, as more fully explained in this opinion, we reverse the Court of Appeals judgment as to whether MCL 418.171 applies.[2]

I. FACTS AND PROCEEDINGS

Plaintiff David McQueer worked intermittently as a laborer for defendant Perfect Fence Company.[3] On

[1] MCL 418.101 *et seq*.

[2] We deny leave as to any remaining issues because a majority of the Court does not believe the remaining issues merit further review.

[3] It appears that plaintiff was a longtime employee of defendant. There is conflicting evidence regarding whether plaintiff requested to be paid "off the books."

January 14, 2014, plaintiff was injured on the job when he was struck in the head by the bucket of a Bobcat front-loader. Plaintiff was installing fence posts with a coworker and Mike Peterson.[4] The proper method for installing fence posts is to use an auger or hand-digger to dig post holes to a depth of anywhere between 3 and 6 feet. Despite knowing this, Peterson decided to use the Bobcat bucket to hammer the fence posts into the frozen ground. Peterson and plaintiff had previously used the Bobcat bucket to hammer fence posts into the ground without injury.

Sometime before this accident, Bob Krumm, part-owner of defendant, learned that Peterson had used the Bobcat to hammer fence posts. Krumm became upset over this misuse of the Bobcat and informed Peterson and other employees that this extremely dangerous misuse of the Bobcat must cease immediately. During pretrial discovery, Krumm offered deposition testimony that when someone misuses a Bobcat to install fence posts in this manner he or she is "guaranteed to get hurt." Although plaintiff knew that Krumm did not want the Bobcat used to install fence posts, plaintiff felt compelled to "go along" with Peterson's actions, presumably because he was a senior employee to plaintiff. At the time of the Bobcat accident, plaintiff sat underneath the bucket, was not wearing a hard hat, and was talking on his cell phone. Plaintiff explained that Peterson had "miscalculated" in lowering the bucket, resulting in the fence post going farther into the ground than anticipated. Accord-

[4] Plaintiff maintains that Peterson was his supervisor. Defendant maintains that Peterson was merely the senior member of the crew dispatched to the jobsite. To the extent there is a difference in these descriptions, viewing the evidence in a light most favorable to plaintiff, we accept for purposes of addressing defendant's claim of error that Peterson was plaintiff's supervisor.

ing to plaintiff, the fence post hit a water pocket, which caused the post to go into the ground deeper than anticipated, causing the bucket to lower with some degree of force onto his head. Plaintiff testified in a deposition that Peterson did not intentionally injure him with the Bobcat. Plaintiff further stated in the deposition that he did not foresee this injury occurring through the misuse of the Bobcat.

The testimony diverges regarding what happened after the accident. According to plaintiff, as he was being transported to the hospital, Peterson told him not to tell anyone at the hospital that he was injured while working for defendant because he was "not on the books" and there were no workers' compensation benefits for him. After his release from the hospital, plaintiff claims that Krumm and defendant's accountant visited him at home and told him that he was not covered under defendant's workers' compensation plan. Krumm and defendant's accountant denied any such conversation. Regardless, it is undisputed that defendant had workers' compensation insurance that covered plaintiff's injuries. And, in fact, plaintiff is receiving ongoing workers' compensation benefits through defendant's workers' compensation insurer.

Plaintiff brought suit against defendant, alleging multiple claims based on negligence. Defendant moved for summary disposition on the ground that the WDCA's exclusive-remedy provision barred plaintiff's civil action. Plaintiff responded in opposition that his civil action was not barred under the WDCA because defendant had violated MCL 418.611 by failing to procure workers' compensation coverage for him and had violated MCL 418.171 by encouraging him to pose as a nonemployee. Plaintiff additionally moved to amend his complaint to add claims of intentional tort and

breach of an employment contract. Plaintiff argued that the evidence raised a question of fact about whether defendant intended to injure him in a way that brought plaintiff's claim within the scope of the intentional-tort exception to the exclusive-remedy provision of the WDCA.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), concluding that defendant had not violated MCL 418.611 because defendant had provided workers' compensation coverage. The court also ruled that MCL 418.171 was not applicable to plaintiff's claims. The court denied plaintiff's motion to amend his complaint, concluding that amendment would be futile because the undisputed facts did not demonstrate that defendant intended to injure plaintiff.[5] Plaintiff appealed.

The Court of Appeals reversed the trial court's grant of summary disposition and denial of plaintiff's motion to amend his complaint.[6] The panel agreed with the trial court that defendant had not violated MCL 418.611.[7] The panel, however, concluded that plaintiff established a question of fact regarding whether defendant under MCL 418.171(4) used " 'coercion, intimidation, deceit, or other means to encourage persons who

[5] The trial court also denied plaintiff's request to add a breach-of-contract claim after granting defendant's motion for summary disposition and denying plaintiff's request to amend his complaint to include an intentional-tort claim. The court concluded that the breach-of-contract claim alone was insufficient to meet the jurisdictional threshold of the circuit court.

[6] *McQueer v Perfect Fence Co*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2016 (Docket No. 325619), p 1. Chief Judge TALBOT joined the majority's opinion in full but wrote a concurring opinion addressing whether plaintiff had standing. *McQueer*, unpub op at 1 (TALBOT, C.J., concurring). The standing issue is no longer in dispute.

[7] *McQueer*, unpub op at 4-5.

would otherwise be considered employees within the meaning of this act to pose as contractors for the purpose of evading' liability under sections 171 or 611 of the WDCA."[8] The panel also concluded that plaintiff had presented sufficient evidence to create a question of fact regarding whether an intentional tort had occurred under the judicially created "continuously operative dangerous condition" exception to the WDCA's exclusive-remedy provision.[9] Thus, the panel determined that the trial court abused its discretion by not allowing plaintiff to amend his complaint.[10]

Defendant sought leave to appeal in this Court. We directed the Clerk of this Court to schedule oral argument on whether to grant the application or take other action, ordering the parties to address the following issues:

> (1) whether the statutory employer provision of MCL 418.171 is applicable to the plaintiff's claims; and (2) if so, whether the plaintiff has established a genuine issue of material fact sufficient to avoid summary disposition; and (3) whether the Court of Appeals erred by reversing the Grand Traverse Circuit Court's order denying, on the basis of futility, the plaintiff's motion to amend his complaint to add an intentional tort claim.[11]

II. STANDARD OF REVIEW

We review de novo questions of law in a workers' compensation case.[12] Questions of statutory interpre-

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[8] *Id*. at 6, quoting MCL 418.171(4).

[9] *McQueer*, unpub op at 10.

[10] *Id*.

[11] *McQueer v Perfect Fence Co*, 501 Mich 954 (2018).

[12] *Smitter v Thornapple Twp*, 494 Mich 121, 129; 833 NW2d 875 (2013).

tation are likewise reviewed de novo.[13] We also review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10).[14]

III. ANALYSIS

The dispositive question before this Court is whether the statutory-employer provision under MCL 418.171 is applicable to the facts developed in this case.[15] All matters of statutory interpretation begin with an examination of the language of the statute.[16] "The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written."[17] "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."[18] A statutory term or phrase "cannot be viewed in isolation, but must be construed in accordance with the surrounding text and the statutory scheme."[19]

The exclusive-remedy provision in MCL 418.131(1) provides that the right to recover workers' compensa-

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[13] *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016).

[14] *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016).

[15] The colloquial phrase "statutory employer" may be helpful shorthand in referring to a statutorily imposed employment relationship. Needless to say, however, courts must always look to the language of MCL 418.171 in order to determine whether this employment relationship exists in a given matter.

[16] *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007).

[17] *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

[18] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

[19] *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217, 232; 683 NW2d 639 (2004).

tion benefits under the WDCA "shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." But MCL 418.641(2) provides that if an employer violates MCL 418.171, the employee "shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment notwithstanding the provisions of [MCL 418.131]." Thus, the question turns on whether defendant violated § 171.

MCL 418.171 reads, in pertinent part:

> (1) If any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act . . . and who does not become subject to this act . . . prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal. . . .
>
> * * *
>
> (3) This section shall apply to a principal and contractor only if the contractor engages persons to work other than persons who would not be considered employees under section 161(1)(d).
>
> (4) Principals willfully acting to circumvent the provisions of this section or section 611 by using coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees within the meaning of this act to pose as contractors for the purpose of evading this section or the requirements of section 611 shall be liable subject to the provisions of section 641.

Subsection (1) sets forth a statutorily imposed employment relationship, under which an employer assumes the role of a "principal" by contracting with an independent contractor, referred to as the "contractor," for the performance of any work. The principal becomes liable for the payment of workers' compensation benefits to "any person employed" by the contractor for injuries sustained while performing any work on behalf of the principal, provided that the contractor is either not subject to the WDCA or has failed to obtain adequate insurance as required by the WDCA. Subsection (1) thus creates a tripartite employment relationship among the principal, the contractor, and the contractor's employees.[20] Subsection (3), worded in the affirmative, provides that § 171 applies to a principal and contractor only if the contractor engages employees, as defined elsewhere in the WDCA.[21] Subsection (4), particularly relevant here, provides a civil remedy when the principal uses "coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees within the meaning of this act to pose as contractors for the purpose of evading" liability under §§ 171 or 611 of the WDCA.[22]

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[20] See, e.g., *Williams v Lang (After Remand)*, 415 Mich 179, 194; 327 NW2d 240 (1982) (opinion by WILLIAMS, J.) ("[F]or an employee to recover from a principal [under § 171(1)], there must be," among other things, "a contract between the principal who is covered by the WDCA and a contractor employer who is not covered[.]").

[21] Throughout these proceedings the litigants have accepted that the definition of "employee" referred to in § 171(3) is found in § 161(1)(n), not § 161(1)(d). Because no argument has been raised on this point, we need not address the validity of this interpretation.

[22] Subsection (2) entitles a principal to indemnification by the contractor for the payment of workers' compensation benefits to the contractor's employees. Though indemnification is not at issue, Subsection (2) emphasizes that the statutory-employer provision pertains to a contractor relationship. To "indemnify" means "[t]o reimburse (another) for a

The Court of Appeals erred by considering the civil-remedy provision of MCL 418.171(4) in isolation. When engaging in statutory construction, courts must construe the text as a whole.[23] Read as a whole, it is clear that § 171 is not applicable in this matter. Subsection (1) statutorily imposes an employment relationship between the principal and the contractor's uninsured employees for purposes of providing workers' compensation benefits. In general, statutory-employer provisions generally prevent an employer from escaping workers' compensation liability by contracting with uninsured contractors to do work that is part of the employer's trade, business, or occupation.[24] Section 171

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loss suffered because of a third party's or one's own act or default[.]" *Black's Law Dictionary* (10th ed). Subsection (2) thus allows the principal to be reimbursed for payments made for a loss suffered on behalf of the contractor's employees. This is in stark contrast from the employer-employee relationship here.

The dissent argues that Subsection (2) does not support the conclusion that the statutory-employer provision applies only to a tripartite employment relationship. Subsection (2) states in pertinent part that "[t]he *principal*, in case he or she pays compensation to the *employee* of such contractor, may recover the amount so paid in an action against such *contractor*." MCL 418.171(2) (emphasis added). Thus, Subsection (2) expressly sets forth a tripartite employment relationship in which indemnification is feasible.

[23] *Sweatt v Dep't of Corrections*, 468 Mich 172, 179-180; 661 NW2d 201 (2003); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012) p 167 ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

[24] See 1 Modern Workers Compensation, § 103:17. Statutory-employer, or "contractor-under" statutes, impose on the general employer compensation liability to the employees of contractors under it. Larson's Workers' Compensation Law, § 70.01. "The purpose of [these statutes] . . . was to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably respon-

thus effectively works as a "safety net" to protect the employees of contractors who do not have adequate workers' compensation insurance. Subsection (3) explicitly sets forth when the statutory-employer provision is applicable, stating that "[t]his *section* shall apply to a principal and contractor *only if* the contractor engages persons to work other than persons who would not be considered employees . . . ."[25] The qualifying language—"only if"—limits the applicability of the entire section, including Subsection (4). In other words, if the requirements under Subsection (3) are not met, then an injured employee cannot seek the civil remedy under Subsection (4).[26]

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sible principal contractor, which has it within its power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers." *Id*. at § 70.04.

[25] Emphasis added.

[26] The dissent argues that "MCL 418.171(3) does not limit the application of all matters arising under MCL 418.171." *Post* at 309. Like plaintiff's counsel at oral argument, the dissent would effectively rewrite Subsection (3) to provide that the words "this section" really mean "Subsection (1)." The dissent emphasizes that Subsection (3) states that "[t]his section shall apply to a principal *and contractor* . . . ." (Emphasis added.) The Legislature's reference to the contractor under Subsection (3) makes sense because both the principal and contractor can be independently liable under § 171. See note 22 of this opinion (discussing indemnification by the contractor). The dissent reads a restraint into Subsection (3) that is simply not there. Nothing in Subsection (3) ties the principal's liability to a finding of liability on the part of the contractor. Subsection (3) plainly states, "[MCL 418.171] shall apply to a principal . . . only if the contractor engages persons to work other than persons who would not be considered employees under [MCL 418.]161(1)(d)." The dissent also questions the placement of Subsection (3), claiming that if the Legislature truly meant to limit Subsection (4)'s application to "tripartite relationships, surely it would have used clearer language and placed a subsection regulating the entirety of the section at the beginning or end of the statute." *Post* at 309. This Court will not reject a reasonable construction because the Legislature might have stated its intentions differently. See *Duffy v Dep't of Natural Resources*, 490 Mich 198, 222; 805 NW2d 399 (2011). And unlike the construction proposed by the dissent, the majority's

The requirements of Subsection (3) were not met in the instant case. Thus, the parties here were not under any statutory-employment relationship. It is undisputed that plaintiff was an employee of defendant—his direct employer. Plaintiff was not an employee of a contractor, and thus no tripartite employment relationship existed. As previously stated, if the requirements of Subsection (3) are not met, then an injured employee cannot seek the civil remedy under Subsection (4).

The dissent—reading Subsection (4) in isolation—argues that the requirement for a tripartite relationship renders the reference in Subsection (4) to § 611 superfluous. The dissent suggests that the Legislature's references to § 171 and § 611 under Subsection (4) are only relevant if the principal is trying to evade *its* obligations under § 611 by not maintaining workers' compensation coverage. Subsection (4), however, does not express that the principal must be trying to evade its own responsibilities. But the principal could be attempting to help the contractor evade § 611 by getting the contractor's employees to pose as independent contractors. Moreover, the principal would not escape liability if it coerced its direct employees to pose as independent contractors. Section 641(2) also applies if a direct employer violates § 611. Thus, if a direct employer coerced its employees to pose as contractors to evade workers' compensation coverage under § 611, then it is subject to civil liability under § 641(2).[27]

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construction of § 171 does not ignore the clear language of Subsection (3).

[27] The dissent is correct that § 641(2) imposes civil liability when there is a violation of § 611. Yet if the employer does not violate § 611, then the employer provided workers' compensation coverage for its employees as required under the WDCA. We refuse to read an inchoate violation of § 611 into the WDCA that allows an employee to avoid the exclusive remedy.

The Court of Appeals also failed to give proper meaning to the term "principal," which has a specialized meaning under § 171 and is not interchangeable with the term "employer." Subsection (1) designates the "principal" as an employer who contracts with a contractor that does not have adequate workers' compensation coverage for its employees. Thus, not all employers are principals under the statutory-employer provision. This conclusion is further confirmed by another part of Subsection (1), which states that a principal can be liable to pay the compensation that it "would have been liable to pay if that person [i.e., the contractor's employee] had been immediately employed by the principal." In other words, the principal is not the employee's actual employer. Instead, as Subsection (1) goes on to provide, if "compensation is claimed from or proceedings are taken against the principal, then . . . reference to the principal shall be substituted for reference to the employer . . . ." Consequently, the principal is merely deemed to be the employer for certain purposes.

To read "principal" as being equivalent with "employer" would render the statutory requirements under Subsection (1) superfluous. The principal may have its own employees, but those employees are not the protected parties under § 171. Under that section, the principal may become the statutory employer only for purposes of providing workers' compensation benefits to the contractor's employees.[28]

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[28] The dissent argues that the term "principal" under § 171 only means "any employer subject to the provisions of this act"—in other words, that the terms "employer" and "principal" are synonymous. The dissent argues that the Legislature's use of the term "if" at the beginning of Subsection (1) does not give meaning to the term "principal" but sets forth conditions as to when the principal is liable under the statutory-employer provision. We agree that the term "if" is a condi-

The specialized meaning of "principal" is critical when employing the whole-text canon of construction to interpret § 171. The civil-remedy provision under Subsection (4) only applies to "[*p*]*rincipals* willfully acting to circumvent the provisions of this section or section 611" by encouraging employees to pose as contractors. The Legislature's use of the term "principal" under Subsection (4) is presumed to be intentional. There is no dispute that defendant was plaintiff's direct employer. Defendant had not contracted with a contractor with inadequate workers' compensation coverage for its own employees. Thus, defendant is not a "principal" for purposes of the statutory-employer provision. Because defendant is not a "principal," the civil-remedy provision under Subsection (4) does not apply. For these reasons, § 171 is not applicable in this case.[29]

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tional conjunction, and thus signals a condition precedent. We disagree, however, that the conditional wording under Subsection (1) does not give meaning to the term "principal." For example, *if* an employer who contracts with a contractor that does not have adequate workers' compensation coverage for its employees, *then* that employer is deemed a "principal" under § 171. Further, the Legislature's placement of the clause "in this section referred to as the principal" does not remove the additional statutory requirements needed for a "principal" under Subsection (1). The dissent's interpretation of § 171 ignores this statutory language.

[29] The dissent, quoting a 1995 opinion of the Court of Appeals, claims that denying plaintiff a remedy under § 171(4) is "in opposition to the principle that the WDCA is 'to be construed liberally in a humanitarian manner in favor of injured employees.' " *Post* at 307 n 4, quoting *Smeester v Pub-N-Grub, Inc (On Remand)*, 208 Mich App 308, 312; 527 NW2d 5 (1995). This Court has more recently tended to restrain calls for liberal or strict construction, opting instead for a reasonable construction of all legal texts. See *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 71; 894 NW2d 535 (2017); see also Corrigan & Thomas, *"Dice Loading" Rules of Statutory Interpretation*, 59 NYU Ann Surv Am L 231, 231-233 (2003). Further, even if we were to employ a "liberal construction" of the WDCA, such a construction would not mean the act should be judicially rewritten to allow an employee to circumvent

IV. CONCLUSION

We hold that the statutory-employer provision under MCL 418.171 is not applicable in this case, and thus, plaintiff cannot seek a civil remedy under Subsection (4). We reverse the Court of Appeals judgment as to MCL 418.171 and deny leave as to any remaining issues presented in the application because a majority of the Court does not believe the remaining issues are worthy of review.

MARKMAN, C.J., and VIVIANO and WILDER, JJ., concurred with ZAHRA, J.

ZAHRA, J. (*concurring and dissenting in part*). I concur in all aspects of the majority opinion, including the fact that there is not a majority of the Court willing to take further action on defendant's application. I write separately to address defendant's claim that the Court of Appeals erred by reversing the trial court's denial of plaintiff's motion to amend the complaint to assert an intentional-tort claim. Plaintiff asked the trial court to permit him to amend his complaint to allege that defendant committed an intentional tort, which is an express exception to the exclusive-remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*.[1] The trial court denied plaintiff the opportunity to amend his complaint, finding that the amendment would be futile. The Court of Appeals reversed, holding that the trial court had abused its discretion when it concluded the proposed

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the WDCA in order to bring a civil action. In sum, rather than putting a thumb on the scale in favor of the employee, we take a reasonable-construction approach to give meaning to MCL 418.171.

[1] See MCL 418.131(1).

amendment was futile. According to the Court of Appeals, plaintiff presented sufficient facts to establish a viable intentional-tort claim. I cannot conclude that the trial court abused its discretion by denying plaintiff's motion to amend his complaint. The plain language of the act provides that "[a]n intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury."[2] Plaintiff failed to present evidence that defendant had a specific intent to injure him. Similarly, under the applicable caselaw, plaintiff did not establish that defendant "had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge."[3] Therefore, the trial court's decision to reject plaintiff's motion to amend his complaint to allege an intentional tort was not an abuse of discretion.

For these reasons, I would have fully reversed the Court of Appeals' judgment and reinstated the trial court's orders granting summary disposition in favor of defendant and denying plaintiff's motion to amend his complaint.

I. STANDARD OF REVIEW

Whether to grant leave to amend a complaint is left to the sound discretion of the trial court. In early stages of litigation, leave to amend a complaint should be freely granted. But this is not to say that all dispositive motions can be thwarted by a motion to amend the pleadings. Amendments may be denied "for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated

[2] *Id.*

[3] *Id.*; see also *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996).

failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile."[4]

A reviewing court "will not reverse a trial court's decision to deny leave to amend pleadings unless it constituted an abuse of discretion."[5] An abuse of discretion occurs when the decision falls outside the range of reasonable and principled outcomes.[6] Further, whether an act constitutes an intentional tort under the WDCA is generally a question of law that is reviewed de novo.[7]

II. ANALYSIS

The trial court denied plaintiff's motion to amend the complaint because it concluded that amendment would be futile. Stated more precisely, the trial court concluded that plaintiff could not establish a viable claim for intentional tort to avoid the exclusive-remedy provision of the WDCA. As set forth in the majority opinion, MCL 418.131 provides that workers' compensation benefits are the exclusive remedy available to an employee against his or her employer. The exclusive-remedy provision, however, does not bar a civil remedy if the employee's injury resulted from the employer's intentional tort. Section 131(1) provides, in pertinent part:

> The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the

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[4] *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007), quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649; 213 NW2d 134 (1973).

[5] *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

[6] *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017).

[7] See MCL 418.131(1) ("The issue of whether an act was an intentional tort shall be a question of law for the court.").

> employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

The plain language of § 131(1) "makes clear that intentional conduct by the employer is the requisite standard" that triggers the intentional-tort exception.[8] Our decision in *Travis v Dreis & Krump Mfg Co* provided guidance for how an employee may demonstrate an employer's intentional conduct.[9]

A plaintiff employee can prove the intentional-tort exception through direct evidence by demonstrating that the plaintiff's injury was the result of the employer's deliberate act or omission and that the defendant employer specifically intended an injury.[10] The Legislature's intent in § 131(1) was to require that an employee show that the employer had a specific intent to injure.[11] In the alternative, a plaintiff employee can prove that an employer had the specific intent to injure through circumstantial evidence by establishing that (1) the employer had actual knowledge[12] (2) that an

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[8] *Gray v Morley (After Remand)*, 460 Mich 738, 742; 596 NW2d 922 (1999).

[9] *Travis*, 453 Mich at 169-180 (opinion by BOYLE, J.). A majority of this Court concurred in the analysis established in Justice BOYLE's lead opinion. *Id*. at 191-192 (RILEY, J., concurring in part and dissenting in part).

[10] *Id*. at 169-170 (opinion by BOYLE, J.). A plaintiff must show that the employer had a conscious purpose to bring about specific consequences. *Id*. at 180. When the employer is a corporation, a particular employee must possess the requisite state of mind to prove an intentional tort. *Id*. at 171-172.

[11] *Id*. at 172.

[12] Requiring "actual knowledge" precludes liability based on implied, imputed, or constructive knowledge. See *Travis*, 453 Mich at 173-174 (opinion by BOYLE, J.) ("A plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee has actual knowledge that an injury would follow from what the employer deliberately did or did not do.").

injury was certain to occur[13] (3) yet willfully disregarded that knowledge.[14]

The Court of Appeals erred by concluding that the trial court abused its discretion in finding plaintiff's proposed amended complaint futile. Plaintiff admits that Mike Peterson did not intend to injure him. Further, plaintiff testified that Peterson "miscalculated" or "over-calculated" the lowering of the Bobcat's bucket. By all accounts, this was an accident, albeit an accident that was foreseeable and entirely avoidable.

Plaintiff also presented no evidence that defendant had "actual knowledge that an injury was certain to occur yet willfully disregarded that knowledge." The panel placed great weight on the pretrial deposition testimony of Bob Krumm, part-owner of defendant, that "you're guaranteed to get hurt" in reference to his employee's misuse of the Bobcat, in support of its conclusion that Krumm knew an injury was certain to occur.[15] But there is no record evidence that Krumm, in conveying his directive that the employees refrain from misusing the Bobcat, knew that "injury was certain to occur" if such misuse continued. Krumm's opinion that injury was certain to occur only came to light after this accident, with the benefit of hindsight, and in the

[13] Requiring that an injury be "certain to occur" establishes an extremely high standard of proof that cannot be met by relying on laws of probability, mere occurrence of a similar event, or conclusory statements of experts. *Id*. at 174-175. The employer's awareness that a dangerous condition exists is not enough, but instead the employer must be aware that injury is certain to result from what the actor does. *Id*. at 176.

[14] Establishing "willful disregard" requires proof that an employer's act or failure to act is more than mere negligence (e.g., failing to protect someone from a foreseeable harm). An employer must disregard actual knowledge that an injury is certain to occur. *Id*. at 180.

[15] See *McQueer*, unpub op at 9.

course of the discovery process. Moreover, such a colloquial expression should not be taken literally. Krumm's testimony was a conclusory statement—made by a *nonexpert*—expressing the danger in his employee's actions. In fact, even "conclusory statements by *experts* are insufficient to allege the certainty of injury contemplated by the Legislature."[16]

Even assuming arguendo that Krumm had knowledge that injury was certain to occur, plaintiff failed to establish that Peterson, plaintiff's alleged supervisor, had actual knowledge that an injury was certain to occur. "The intent requirement will not be fulfilled by presenting 'disconnected facts possessed by various employees or agents of that corporation . . . .' "[17] Plaintiff testified that he and Peterson had commonly used the Bobcat to hammer fence posts on prior jobs without injury.[18] The use of a Bobcat to install fence posts, especially sitting underneath the bucket, is unquestionably dangerous and presents a high probability of injury. The danger and probability of injury, however, do not meet the Legislature's "extremely high standard of proof" that an injury must be certain to occur. Thus, plaintiff failed to demonstrate defendant's specific intent to injure him.

The Court of Appeals also erred in its application of the judicially created "continuously operative dangerous condition" exception. A continuously operative dangerous condition may form the basis of a claim under

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[16] *Travis*, 453 Mich at 174 (opinion by BOYLE, J.) (emphasis added).

[17] *Id*. at 172, quoting *Adams v Nat'l Bank of Detroit*, 444 Mich 329, 369; 508 NW2d 464 (1993) (opinion by BRICKLEY, J.).

[18] See *Gray*, 460 Mich at 740 (concluding that the defendant did not know that his action of driving erratically while the plaintiff was sitting in the bed of the defendant's truck was "certain" to cause injury when the defendant had driven erratically with the plaintiff in the bed of the defendant's truck "six to eight times" before the injury).

the intentional-tort exception only if the employer knows the condition will cause an injury and *refrains from informing the employee about it.*[19] The key is that the employee is left in the dark about the dangerous condition and is thus "unable to take steps to keep from being injured . . . ."[20] It is not enough that a dangerous condition merely exists.[21]

In this case, defendant did not refrain from informing plaintiff about the dangerous condition—the misuse of the Bobcat to install fence posts. The facts are undisputed that Krumm admonished both plaintiff and Peterson that using the Bobcat in this manner was dangerous. According to plaintiff, Krumm warned plaintiff and Peterson that their misuse of the Bobcat was "dangerous as hell" and "you guys better not do that." Plaintiff further testified that Krumm "got mad and told us not to do it no more." Thus, plaintiff was not kept in the dark, but was informed of the dangerous condition. Accordingly, plaintiff was not subject to a continuously operative dangerous condition.

The undisputed material facts demonstrate that defendant did not specifically intend to injure plaintiff. Whether defendant took adequate measures to ensure that Peterson would not again misuse the Bobcat or that plaintiff would not sit underneath the Bobcat's bucket are questions relating to negligence. Mere negligence in failing "to act to protect a person who might foreseeably be injured from an appreciable risk of harm" does not satisfy the intentional-tort exception

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[19] *Travis*, 453 Mich at 178 (opinion by BOYLE, J.); see also *Alexander v Demmer Corp*, 468 Mich 896 (2003); *Giles v Ameritech*, 468 Mich 897 (2003).

[20] *Travis*, 453 Mich at 178 (opinion by BOYLE, J.).

[21] See *id*. at 176.

under the WDCA.[22] Further, the mere allegation of gross negligence or reckless disregard is insufficient to avoid the exclusive-remedy provision.[23] In sum, plaintiff's injury was likely the result of negligence, but there is no evidence that this injury was certain to occur, particularly in light of Krumm's undisputed directive that the Bobcat not be used in this manner. For these reasons, the trial court's decision to reject plaintiff's motion to amend his complaint to allege an intentional tort was not an abuse of discretion.[24]

III. CONCLUSION

We held in the majority opinion that the statutory-employer provision in MCL 418.171 is not applicable in this case and that plaintiff therefore cannot seek a civil remedy under § 171(4). I would further conclude that the trial court did not abuse its discretion when denying plaintiff's motion to amend his complaint to allege an intentional tort. Defendant had neither the specific intent to injure plaintiff nor "actual knowledge that an

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[22] *Id*. at 179.

[23] See *Gray*, 460 Mich at 744.

[24] Plaintiff argues that the trial court erred when it considered the substantive merits of his intentional-tort claim when ruling on his motion to amend the complaint. See *Ben P Fyke & Sons*, 390 Mich at 660 (stating that "a court should ignore the substantive merits of a claim or defense" when considering a motion to amend "unless it is legally insufficient on its face"). Despite this statement in *Fyke*, a trial court has the authority to, on its own initiative, "render judgment without delay" if "the affidavits or other proofs show that there is no genuine issue of material fact . . . ." MCR 2.116(I)(1). The trial court here considered evidence outside the pleadings, viewed that evidence in the light most favorable to plaintiff, and essentially determined that further factual development was unnecessary because plaintiff, given his own admissions and deposition testimony, could not provide a factual basis to support an intentional-tort claim. Thus, even if the court erred by denying plaintiff's motion to amend on the basis that amendment was futile, its decision is justified under MCR 2.116(I)(1), and therefore any error is harmless.

injury was certain to occur" that he willfully disregarded. MCL 418.131(1). Plaintiff's civil claims against defendant are thus barred by the exclusive-remedy provision of the WDCA.[25]

Accordingly, I would fully reverse the judgment of the Court of Appeals and reinstate the trial court's orders granting summary disposition in favor of defendant and denying plaintiff's motion to amend his complaint.

MARKMAN, C.J., and WILDER, J., concurred with ZAHRA, J.

CLEMENT, J. (*concurring in part and dissenting in part*). The majority opinion concludes that MCL 418.171(4) of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., provides a civil remedy only to an employee of a contractor engaged to a principal and that, accordingly, plaintiff has no cause of action under MCL 418.171. Because I disagree with the majority's interpretation and application of MCL 418.171(4), I dissent. However, I concur with respect to the majority's decision to deny leave to appeal regarding the intentional-tort issue.

As the majority opinion sets forth, under the WDCA, employees are entitled to recover damages from their employer in a civil action when they are injured in the course of employment if the employer has violated MCL 418.171. MCL 418.641(2).[1] MCL 418.171 provides as follows:

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[25] Because I would reverse the Court of Appeals' decision as to both the application of MCL 418.171(4) and the intentional-tort claim, I would reinstate the trial court's decision to deny plaintiff's motion to amend his complaint to include a breach-of-contract claim.

[1] MCL 418.641(2) also provides for an employer's civil liability to an employee if the employer has violated MCL 418.611. MCL 418.611 governs workers' compensation coverage requirements for employers,

(1) If any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act or who has not complied with the provisions of section 611, and who does not become subject to this act or comply with the provisions of section 611 prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal. . . .

(2) If the principal is liable to pay compensation under this section, he or she shall be entitled to be indemnified by the contractor or subcontractor. . . .

(3) This section shall apply to a principal and contractor only if the contractor engages persons to work other than persons who would not be considered employees under section 161(1)(d).

(4) Principals willfully acting to circumvent the provisions of this section or section 611 by using coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees within the meaning of this act to pose as contractors for the purpose of evading this section or the requirements of section 611 shall be liable subject to the provisions of section 641. . . .

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requiring an employer subject to the WDCA to either obtain insurance or self-insure for the purposes of providing disability compensation to employees. Here, no violation of MCL 418.611 occurred because defendant had workers' compensation insurance that was ultimately applied to plaintiff's injuries. Defendant's failure to list plaintiff as an employee to its insurer and subsequent failure to pay a premium to cover plaintiff's employment does not constitute a failure to obtain insurance given that insurance was obtained and that insurance did, in fact, apply to plaintiff's injuries. Whether defendant's actions could constitute an attempt to circumvent the requirements of MCL 418.611 is discussed later in this opinion.

Accordingly, MCL 418.171(1) creates civil liability on the part of a principal employer who hires contractors that have their own employees but lack workers' compensation insurance. MCL 418.171(2) entitles the principal employer to be indemnified by the contractor for the employer's liability under MCL 418.171(1). Next, MCL 418.171(3) provides that the principal employer is only liable under MCL 418.171 if the contractor engages persons considered employees under the WDCA.[2]

The crux of this appeal is whether MCL 418.171(4), which exposes an employer to tort liability if the employer encourages would-be employees "to pose as contractors for the purpose of evading this section or the requirements of section 611," applies to a situation in which there is only an employer and an employee (i.e., a situation without an intervening contractor).[3]

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[2] The parties have agreed that the definition of "employee" referred to in MCL 418.171(3) is the definition found in MCL 418.161(1)(n) and not the definition found in MCL 418.161(1)(d). I agree with the majority opinion that, considering the parties' agreement on this issue, we need not address the validity of this interpretation.

[3] This Court reviews de novo questions of law in a workers' compensation case. *Smitter v Thornapple Twp*, 494 Mich 121, 129; 833 NW2d 875 (2013). This Court also reviews de novo questions of statutory interpretation. *Id*. When interpreting a statute, this Court must first look to the plain language of the statute and, if the statutory language is clear and unambiguous, must apply the statute according to that plain meaning. *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007); *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). Further, this Court must construe a statute in accordance with its surrounding text and statutory scheme rather than in isolation. *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217, 232; 683 NW2d 639 (2004). As to the WDCA in particular, "[t]he WDCA is remedial in nature and is to be construed liberally in a humanitarian manner in favor of injured employees." *Smeester v Pub-N-Grub, Inc (On Remand)*, 208 Mich App 308, 312; 527 NW2d 5 (1995). See also *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 651; 364 NW2d 670 (1984).

This subsection of the WDCA is designed to prevent employers from misclassifying employees as contractors for the purpose of avoiding WDCA requirements. Such avoidance would lower the workers' compensation costs for an employer but expose its employees to risk. It also would inhibit the ability of the WDCA to provide comprehensive coverage to all applicable recipients because the WDCA, like most other insurance schemes, relies on risk pooling to finance liability. For the reasons set forth in this opinion, I would affirm the Court of Appeals' ruling that this statute applies outside the tripartite relationship of principal-contractor-employee and that plaintiff has raised a genuine issue of material fact as to whether he is entitled to compensation under MCL 418.171(4).

MCL 418.171(4) refers to "[p]rincipals," who are defined in MCL 418.171(1) as "any employer subject to the provisions of this act." The majority opinion instead asserts that MCL 418.171(1) defines a "principal" as "an employer who contracts with a contractor that does not have adequate workers' compensation coverage for its employees." I disagree. The portion of the subsection following the clause "[i]f any employer subject to the provisions of this act, in this section referred to as the principal," only sets the conditions under which a principal is liable under MCL 418.171(1); it does not further define a principal. The subsection states that "[i]f any employer subject to the provisions of this act, in this section referred to as the principal," contracts with another person under certain conditions, the principal is liable. The definition of "principal" espoused by the majority is belied by the subsection's use of the conditional conjunction "if." If a principal were "an employer who contracts with a contractor that does not have adequate workers' compensation coverage for its employees," there would be

no need for the subsection to begin with the word "if," because a principal would only be considered a principal upon fulfillment of those conditions. The use of the conditional conjunction "if" implies that there can be a principal for whom these conditions—contracting with a contractor without adequate workers' compensation—are not met. Accordingly, the plain language of the statute supports an interpretation of a "principal" as any employer subject to the WDCA. See *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007). And here, defendant fits the definition.

MCL 418.171(4) also refers to "employees within the meaning of this act" rather than to persons engaged to work by a contractor. Therefore, neither this reference nor the reference to a principal requires a tripartite relationship for the imposition of liability under MCL 418.171(4).

The reference to MCL 418.611 in MCL 418.171(4) also supports the interpretation that MCL 418.171(4) can be applied outside the tripartite relationship. If MCL 418.171(4) applied only to tripartite relationships, there would be no reason for that subsection to penalize the attempt to avoid the requirements of MCL 418.611 in addition to its penalization of the attempt to avoid the requirements of MCL 418.171. Again, MCL 418.611 requires an employer to secure the payment of compensation, and MCL 418.171 requires a principal employer to compensate its contractor's employees if that contractor is not covered by the WDCA or fails to comply with the WDCA. If the remedy in MCL 418.171(4) is conditioned on a tripartite relationship, a principal acting to circumvent MCL 418.611 would always also be acting to circumvent MCL 418.171 because the principal would be seeking to avoid providing compensation to its contractor's employees un-

der that section. This would render the reference in MCL 418.171(4) to MCL 418.611 superfluous, an interpretation we should not endorse. See *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.").

The consequences of the majority opinion's conclusion also demonstrate that MCL 418.171(4) should not be construed so narrowly. As stated, MCL 418.171(4) imposes liability on a principal who encourages an employee to pose as a contractor for the purposes of evading the requirements of MCL 418.171 or MCL 418.611. If a tripartite relationship is a necessary requirement to liability, as the majority opinion holds, then MCL 418.171(4) only imposes liability when a principal encourages *a contractor's* employee to become a contractor for unlawful purposes. There is no rational reason to limit the liability of a principal seeking to manipulate the WDCA by encouraging would-be employees to pose as contractors to situations in which the would-be employee works for the principal's contractor rather than the principal itself.[4] Interpreting these provisions in that manner leaves the would-be employee of a contractor with greater protection than the employee of an employer.[5] And, considering that a

[4] Interpreting the WDCA in such a manner—one that prevents certain injured employees from seeking civil relief—is also in opposition to the principle that the WDCA is "to be construed liberally in a humanitarian manner in favor of injured employees." *Smeester*, 208 Mich App at 312. See also *Wells*, 421 Mich at 651.

[5] The majority opinion states that the principal would not escape liability if it coerced its direct employees to pose as contractors because MCL 418.641(2) would apply to that situation. However, MCL 418.641(2) imposes civil liability where there is an *actual* violation of

frequent result of becoming a contractor is hiring employees, this interpretation creates the very same situation MCL 418.171 seeks to avoid. See *McCaul v Modern Tile & Carpet, Inc*, 248 Mich App 610, 620; 640 NW2d 589 (2001) ("Section 171 was intended to protect employees of contractors and subcontractors who failed to procure adequate worker's compensation insurance."). Moreover, the principal's incentive to avoid the cost of workers' compensation insurance is present whether the principal is trying to avoid the associated insurance costs of its own employees or that of its contractor's employees, as charged to the principal through the contractor's prices.

Of course, the majority opinion is correct that this Court does not construe subsections of statutes in isolation and that the remainder of MCL 418.171 must be considered in our interpretive analysis. See *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217, 232; 683 NW2d 639 (2004). In support of its interpretation of the statute, the majority relies on MCL 418.171(3), which states, "This section shall apply to a principal and contractor only if the contractor engages persons to work other than persons who would not be considered employees under section 161(1)(d)." From this text, the majority concludes that an injured employee can only seek the remedy provided by MCL 418.171(4) if the requirements of MCL 418.171(3) are met. However, MCL 418.171(3) does not state that "[t]his section *shall only apply* where a contractor engages persons to work," but instead clarifies when the section applies "to a principal and contractor." As

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MCL 418.611, not an *attempt to avoid* MCL 418.611, as MCL 418.171(4) does. Therefore, under the majority opinion's interpretation, it is possible for a principal to escape civil liability if it coerces its direct employees to pose as independent contractors but ultimately fails in its endeavor to avoid WDCA requirements.

noted, MCL 418.171(4) does not require the existence of a contractor; it only requires a principal who encourages a person to become a contractor—whether successfully or not—for the purpose of evading the WDCA's requirements. Accordingly, MCL 418.171(3) does not limit the application of all matters arising under MCL 418.171.[6] It instead appears to provide an exception to MCL 418.171(1) wherein a principal is not required to provide compensation to its contractor's workers if those persons would not be considered an employee under the WDCA. This is further supported by the placement of MCL 418.171(3) following Subsections (1) and (2). Had the Legislature intended MCL 418.171(3) to limit the applicability of each subsection to tripartite relationships, surely it would have used clearer language and placed a subsection regulating the entirety of the section at the beginning or end of the statute. See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West 2012), p 167 ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of *its structure and of the physical and logical relation* of its many parts.") (emphasis added).

Similarly, MCL 418.171(2) also does not support the conclusion that MCL 418.171(4) is applicable only in a tripartite relationship. MCL 418.171(2) provides that "[i]f the principal is liable to pay compensation under this section, he or she shall be entitled to be indemnified by the contractor or subcontractor." The majority

[6] The majority opinion asserts that this interpretation "reads a restraint into Subsection (3) that is simply not there." I would argue that this is exactly what the majority opinion has done in its interpretation of MCL 418.171(4).

opinion asserts that this subsection "emphasizes that the statutory-employer provision pertains to a contractor relationship." It does not. A principal is liable to pay workers' compensation under MCL 418.171 only under the terms of MCL 418.171(1).[7] Therefore, the majority is correct that MCL 418.171(2) allows the principal to be reimbursed for payments made for a loss suffered on behalf of the contractor's employees. And we do not dispute that indemnification under MCL 418.171(2) requires the existence of a tripartite relationship. However, the majority is incorrect that this indemnity provision is contrary to an interpretation of MCL 418.171(4) that allows for civil liability outside the tripartite relationship. MCL 418.171(2) does not restrict or otherwise inform a principal's civil liability for attempting to escape the requirements of the WDCA as provided in MCL 418.171(4); it only provides the opportunity for indemnification if the conditions of MCL 418.171(1) are met and require the principal to pay workers' compensation benefits to a contractor's employees. Accordingly, the language of MCL 418.171(2) does not support the majority's assertion that MCL 418.171(4) applies only to tripartite relationships.

For these reasons, I would hold that MCL 418.171(4) applies to situations wherein there is no tripartite relationship because nothing in the plain language of the statute requires such a relationship. And because MCL 418.171(4) is applicable to the case at bar, I would also affirm the Court of Appeals' holding that the trial court erred by granting summary disposition to defendant because plaintiff has raised a genuine issue of

[7] MCL 418.171(4) allows for a civil action outside of workers' compensation benefits, not the payment of workers' compensation benefits as provided by statute.

material fact[8] as to whether defendant "willfully act[ed] to circumvent the provisions of [MCL 418.171] or [MCL 418.611] by using coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees . . . to pose as contractors for the purpose of evading [MCL 418.171] or the requirements of [MCL 418.611] . . . ." Plaintiff has presented evidence that his supervisor encouraged plaintiff—who acted as a full-time employee—to pose as an independent contractor. Plaintiff alleged that his supervisor told him not to tell anyone at the hospital that he was injured while working for defendant because defendant was "not on the books," that his supervisor informed him that there were no workers' compensation benefits for him, and that a part-owner of defendant and defendant's accountant told plaintiff he was not covered under defendant's workers' compensation plan. And although plaintiff was ultimately paid workers' compensation benefits, MCL 418.171(4) is satisfied if defendant encouraged plaintiff to pose as a contractor *in an attempt to* avoid the requirements of MCL 418.611 to secure the payment of compensation through obtaining workers' compensation insurance or self-insuring. In other words, defendant may have encouraged plaintiff to pose as a contractor to prevent plaintiff from making a claim for workers' compensation benefits. Because we must view the evidence in the light most favorable to plaintiff, I would conclude

[8] The trial court granted summary disposition to defendant pursuant to MCR 2.116(C)(10). MCR 2.116(C)(10) provides that a trial court may grant judgment on all or part of a claim when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

that plaintiff has presented sufficient evidence to allow reasonable minds to differ regarding whether defendant is subject to civil liability under MCL 418.171(4). See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Accordingly, I would have affirmed the judgment of the Court of Appeals reversing the trial court's grant of summary disposition to defendant.

In conclusion, because MCL 418.171(4) is not limited to situations wherein there is a tripartite relationship and because plaintiff has raised a genuine issue of material fact as to whether defendant is subject to liability under MCL 418.171(4), I dissent from this Court's reversal of the Court of Appeals decision as to MCL 418.171(4). However, I concur with this Court's decision to deny leave as to all other issues.

MCCORMACK and BERNSTEIN, JJ., concurred with CLEMENT, J.

PEOPLE v SHARPE

Docket Nos. 155747-155748. Argued April 11, 2018 (Calendar No. 3). Decided July 10, 2018.

Lovell C. Sharpe was charged in the Wayne Circuit Court with two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b, two counts of third-degree CSC, MCL 750.520d, and one count of fourth-degree CSC, MCL 750.520e, based on allegations that he engaged in sexual penetration and conduct with the 14-year-old complainant, DM. DM testified that while her mother was hospitalized from December 31, 2013 through January 5, 2014, and thus was absent from the home, defendant, who had been in a relationship with DM's mother at the time, engaged in sexual penetration and conduct with DM. DM also described another incident wherein the same actions occurred at defendant's home while her mother was sleeping in another room. DM became pregnant. The prosecutor entered DM's medical records into evidence; the records showed that DM had a positive pregnancy test on October 16, 2014, and an abortion on November 17, 2014. DM's mother testified that DM initially refused to tell her mother with whom she had sexual contact, but in April 2015, shortly after DM's mother and defendant ended their relationship, DM informed her mother that defendant had impregnated her. On the basis of this testimony, defendant was bound over to the circuit court. The prosecutor subsequently filed a pretrial motion to admit evidence of (1) DM's pregnancy, (2) DM's abortion, and (3) DM's lack of other sexual partners through November 2014. The court, Shannon N. Walker, J., granted the motion only as to evidence that DM became pregnant and ruled that the other evidence constituted character evidence inadmissible under MRE 404(a)(3). The prosecutor filed an interlocutory appeal, arguing that the entirety of the evidence was admissible under both MRE 404(a)(3) and the rape-shield statute, MCL 750.520j(1). Defendant cross-appealed, seeking a determination that MRE 404(a)(3) and the rape-shield statute excluded the entirety of the evidence. On interlocutory appeal, the Court of Appeals, RIORDAN, P.J., and METER and FORT HOOD, JJ., held that evidence of the complainant's lack of other sexual partners was not subject to the rape-shield statute and was otherwise admis-

sible under the Michigan Rules of Evidence and that evidence of the complainant's pregnancy and abortion fell under the purview of the rape-shield statute but was admissible pursuant to the statute's exception for evidence of the victim's past sexual conduct with the actor. 319 Mich App 153 (2017). Defendant sought leave to appeal in the Supreme Court, and the Supreme Court granted leave to consider (1) whether evidence related to the complainant's pregnancy, abortion, and lack of other sexual partners was within the scope of the rape-shield statute, MCL 750.520j(1); (2) if so, whether the evidence was nonetheless admissible under one of the exceptions set forth in MCL 750.520j(1); and (3) if not, whether the evidence was admissible under general rules governing the admissibility of evidence, such as MRE 402 and MRE 403. 501 Mich 899 (2017).

In an opinion by Justice CLEMENT, joined by Justices ZAHRA, MCCORMACK, VIVIANO, and WILDER, the Supreme Court *held*:

The Court of Appeals correctly held that all the evidence is admissible but erred in its reasoning. None of the evidence falls under the scope of the rape-shield statute, but all the evidence is otherwise admissible under the Michigan Rules of Evidence.

1. The rape-shield statute, MCL 750.520j, serves to limit the admissibility of evidence of a complainant's sexual conduct. MCL 750.520j(1) provides that evidence of specific instances of the victim's sexual conduct shall not be admitted under MCL 750.520b through MCL 750.520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value: (a) evidence of the victim's past sexual conduct with the actor; (b) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. Whether evidence falls within the purview of the rape-shield statute concerns whether the evidence amounts to or references specific conduct, not whether the evidence constitutes a consequence of or relates to sexual activity generally. Because the rape-shield statute does not define the term "specific instances," and because the term "specific instances" is not a term of art, it was appropriate to consult a lay dictionary to establish the plain meaning of the term. "Instance" means "a case or occurrence of something" and "specific" means "specified, precise, or particular." Accordingly, a specific instance of the victim's sexual conduct must relate to a particular occurrence of the victim's sexual conduct.

2. Evidence of DM's pregnancy and evidence of her subsequent abortion were not evidence of a specific instance of the

victim's sexual conduct. Although this evidence necessarily implied that sexual activity occurred that caused the pregnancy, the pregnancy and abortion were not evidence regarding a specific instance of sexual conduct; the evidence demonstrated only that at least one act of sexual intercourse occurred in 2014. The conclusion that pregnancy and abortion were not themselves specific instances of the victim's sexual conduct was bolstered by a reading of MCL 750.520j as a whole. MCL 750.520j(1)(b) excepts relevant evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. In so phrasing the statute, the Legislature has distinguished between the specific instance of sexual activity that shows the origin or the source of the semen, pregnancy, or disease—i.e., whatever sexual act led to these consequences—and the semen, pregnancy, or disease itself. Accordingly, the Legislature has *ipso facto* made clear that semen, pregnancy, or disease, while perhaps related to sex, are not themselves the specific instances of sexual conduct envisioned by MCL 750.520j. And because pregnancy, and by extension abortion, is not a specific instance of sexual conduct, neither pregnancy nor abortion falls within the rape-shield statute. Accordingly, the Court of Appeals erred by determining that evidence of DM's pregnancy and abortion fell under the purview of the rape-shield statute.

3. Evidence that DM did not engage in other sexual intercourse in 2014 did not fall within the plain language of the rape-shield statute. This evidence demonstrated an absence of conduct, not a "specific instance" of sexual conduct, and excluding evidence of a lack of sexual partners under the rape-shield statute would render the phrase "specific instances" meaningless. Accordingly, the Court of Appeals properly determined that DM's lack of other sexual partners did not fall within the scope of the rape-shield statute.

4. MRE 402 provides that relevant evidence is generally admissible. In this case, evidence of DM's pregnancy, abortion, and lack of other sexual partners made it more probable that defendant sexually assaulted DM, and evidence showing that DM, a 14-year-old child, became pregnant was highly probative of the allegation that DM was sexually assaulted. The evidence of DM's abortion corroborated that DM was impregnated and explained the lack of DNA evidence to identify the man who impregnated DM. Further, defendant's offering to pay for half of the cost of the abortion could have demonstrated defendant's consciousness of guilt or desire to destroy evidence. Finally, evidence demonstrating that DM had no sexual partners other

than defendant through November 2014 was, by simple process of elimination, probative of the identity of the person who impregnated DM. Accordingly, the offered evidence was relevant under MRE 402.

5. MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. In this case, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The evidence of DM's pregnancy and abortion definitively demonstrated that sexual penetration occurred. If the jury finds credible DM's testimony that she did not engage in sexual intercourse with anyone other than defendant through November 2014, that testimony proves that defendant was the man who sexually assaulted DM. Accordingly, this evidence was highly probative, and the danger of unfair prejudice created by the evidence did not substantially outweigh this high probative value. Abortion evidence, while perhaps incendiary to some, is not so inherently prejudicial as to render it inadmissible. Although there may be some danger of juror sympathy for a young woman who has gone through pregnancy and abortion or, alternatively, a danger of juror revulsion for a young woman choosing abortion, the evidence here was both highly probative and concise. And to the extent that the abortion evidence could be viewed as cumulative of the evidence of DM's pregnancy, it also served the purpose of explaining why the prosecutor is unable to offer DNA evidence to prove the identity of the man who impregnated DM. If the abortion evidence were not admitted, the jury might be left to speculate as to why DNA evidence is unavailable and whether the pregnancy came to term. As for the lack of sexual partners, the prosecution concisely alleged a valid purpose: the lack of sexual partners eliminates the possibility that someone other than defendant impregnated DM. Moreover, at the time of trial, the trial court has the ability to provide a limiting instruction to the jury concerning the use of this evidence. Accordingly, given the high probative value of the evidence of DM's pregnancy, abortion, and lack of other sexual partners through November 2014, and its low danger of unfair prejudice, the evidence was admissible under MRE 402 and MRE 403.

Affirmed for the reasons stated in the opinion; case remanded to the trial court for further proceedings.

Chief Justice MARKMAN, concurring, agreed with the majority's conclusion that evidence of the complainant's pregnancy, abortion, and lack of other sexual partners was not subject to the rape-shield statute and was admissible under the Michigan Rules

of Evidence, but he reached the conclusion that evidence of the complainant's pregnancy and evidence of the abortion were not subject to the rape-shield statute for different reasons than the majority. Chief Justice MARKMAN would have focused on the language "victim's sexual conduct" as opposed to the majority's focus on the language "specific instances" to reach the conclusion that while pregnancy and abortion are evidence of a *specific instance* of sexual conduct, they are not evidence of a specific instance of the *victim's* sexual conduct. In this case, because only one alleged sexual penetration could have been the source of DM's pregnancy, both evidence of DM's pregnancy and evidence of DM's abortion were—contrary to the majority's assertion—evidence of a "specific instance" of sexual conduct. However, such evidence is not evidence of the "*victim's* sexual conduct"; "conduct" refers only to volitional actions and thus does not encompass involuntary acts such as those that stem from being subjected to sexual abuse.

Justice BERNSTEIN, concurring in part and dissenting in part, agreed with the majority's conclusion that evidence of DM's abortion and her lack of other sexual partners was not governed by the rape-shield statute and that evidence of DM's lack of other sexual partners was admissible under the Michigan Rules of Evidence, but he would have held that evidence of DM's pregnancy was governed by the rape-shield statute and that evidence of DM's abortion was barred by MRE 402 and MRE 403. Justice BERNSTEIN agreed with Chief Justice MARKMAN's conclusion that evidence of DM's pregnancy was evidence of a specific instance of the victim's sexual conduct—the particular sexual encounter that resulted in the pregnancy. Accordingly, because the prosecutor charged defendant with one of the counts of first-degree criminal sexual conduct based on an allegation that a specific instance of sexual penetration resulted in DM becoming pregnant, DM's pregnancy was being presented as evidence of a specific instance of the victim's sexual conduct and evidence of that pregnancy thus fell within the rape-shield statute. Of the two counts of first-degree criminal sexual conduct that defendant was charged with, the majority conceded that one could not have been the source of DM's pregnancy, given the timing. The timing of the remaining count of first-degree criminal sexual conduct had yet to be firmly established. Because the plain language of MCL 750.520j(1)(a) notes that only evidence of the victim's past sexual conduct with the actor is potentially admissible, Justice BERNSTEIN would have held that the rape-shield statute required the prosecutor to make a threshold showing in the trial court about the timing of the alleged sexual penetration in order to establish that DM's pregnancy was linked to past sexual conduct with

defendant. As for evidence of DM's abortion, Justice BERNSTEIN would have held that MRE 402 and MRE 403 barred admission of the evidence. The majority focused on the potential prejudice that might fall on DM; however, given that it was defendant who argued against admission of the evidence of DM's abortion, the focus should have been on the effect of this evidence on defendant, and when viewed in this light, the danger of unfair prejudice to defendant substantially outweighed the probative value of the evidence.

1. EVIDENCE — CRIMINAL SEXUAL CONDUCT — RAPE-SHIELD STATUTE — SPECIFIC INSTANCES OF A VICTIM'S SEXUAL CONDUCT.

MCL 750.520j(1) provides, in relevant part, that evidence of specific instances of the victim's sexual conduct shall not be admitted under MCL 750.520b through MCL 750.520g unless and only to the extent that the judge finds that certain proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value; whether evidence falls within the purview of the rape-shield statute concerns whether the evidence amounts to or references specific conduct, not whether the evidence constitutes a consequence of or relates to sexual activity generally; a specific instance of the victim's sexual conduct must relate to a particular occurrence of the victim's sexual conduct.

2. EVIDENCE — CRIMINAL SEXUAL CONDUCT — RAPE-SHIELD STATUTE — COMPLAINANT'S PREGNANCY AND ABORTION.

MCL 750.520j(1)(b) allows relevant evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease to be admitted into evidence as long as its inflammatory or prejudicial nature does not outweigh its probative value; semen, pregnancy, or disease, while perhaps related to sex, are not themselves the specific instances of sexual conduct envisioned by MCL 750.520j; because pregnancy, and by extension abortion, is not a specific instance of sexual conduct, neither pregnancy nor abortion falls within the scope of the rape-shield statute.

3. EVIDENCE — CRIMINAL SEXUAL CONDUCT — RAPE-SHIELD STATUTE — COMPLAINANT'S LACK OF PREVIOUS SEXUAL INTERCOURSE.

MCL 750.520j(1) provides, in relevant part, that evidence of specific instances of the victim's sexual conduct shall not be admitted under MCL 750.520b through MCL 750.520g unless and only to the extent that the judge finds that certain proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value; evidence

that a complainant did not engage in sexual intercourse demonstrates an absence of conduct, not a specific instance of sexual conduct, and therefore does not fall within the scope of the rape-shield statute.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Madonna Georges Blanchard*, Assistant Prosecuting Attorney, for the people.

Jones Day (by *Syed Ahmadul Huda*) for defendant.

CLEMENT, J. At issue in this case is whether the rape-shield statute, MCL 750.520j, precludes the prosecutor from admitting evidence of a complainant's pregnancy, abortion, and lack of other sexual partners during a criminal-sexual-conduct prosecution. On interlocutory appeal, the Court of Appeals held that evidence of the complainant's lack of other sexual partners was not subject to the rape-shield statute and was otherwise admissible under the Michigan Rules of Evidence. As to evidence of the complainant's pregnancy and abortion, the Court held that this evidence fell under the purview of the rape-shield statute but was admissible pursuant to the statute's exception for evidence of the victim's past sexual conduct with the actor.

We agree that the entirety of the evidence offered is admissible but hold that none of the evidence falls within the scope of the rape-shield statute. Further, we hold that the entirety of the evidence is otherwise admissible under the Michigan Rules of Evidence. Therefore, we reject the reasoning of the Court of Appeals but affirm its disposition that the offered evidence is admissible.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b, two counts of third-degree CSC, MCL 750.520d,[1] and one count of fourth-degree CSC, MCL 750.520e, based on allegations that he engaged in sexual penetration and conduct with the 14-year-old complainant, DM. Defendant was in a relationship with DM's mother through early 2015, and he fathered DM's two half-siblings. Defendant did not reside with DM's mother and the three children during his relationship with DM's mother. According to DM's mother's preliminary-examination testimony, DM's mother was hospitalized from December 31, 2013 through January 5, 2014.[2] During this time, defendant stayed at DM's mother's apartment to care for the children. DM testified that while her mother was absent from the home, defendant "touched" DM "[e]verywhere." She elaborated that he touched her breasts with his mouth and penetrated her vagina with his penis. Upon further questioning, she answered that this was not the first or the only time she had sexual contact with defendant. She described another incident wherein the same actions occurred at defendant's home while her mother was sleeping in another room.

DM became pregnant. The prosecutor entered DM's medical records into evidence, and the records showed

[1] The third-degree CSC charges were in the alternative to the first-degree CSC charges.

[2] DM's mother testified at the preliminary examination that she was hospitalized from December 31, 2013 to January 5, 2014. On cross-examination, she answered in the affirmative when defense counsel asked whether she was hospitalized from December 2014 to January 2015. Because this alleged sexual encounter could not have been the source of DM's pregnancy regardless of which date range was accurate, this discrepancy is not material to the present appeal.

that DM had a positive pregnancy test at Henry Ford Hospital on October 16, 2014, and an abortion at Planned Parenthood on November 17, 2014. DM's mother testified that DM initially refused to tell her mother with whom she had sexual contact. Eventually, in April 2015 and shortly after DM's mother and defendant ended their relationship, DM informed her mother that defendant had impregnated her. On the basis of this testimony, defendant was bound over to the circuit court.

The prosecutor subsequently filed a pretrial motion to admit evidence of (1) DM's pregnancy, (2) DM's abortion, and (3) DM's lack of other sexual partners through November 2014. The trial court granted the motion only as to evidence that DM became pregnant and ruled that the other evidence constituted character evidence inadmissible under MRE 404(a)(3).[3]

The prosecutor filed an interlocutory appeal, arguing that the entirety of the evidence was admissible under both MRE 404(a)(3) and the rape-shield statute, MCL 750.520j(1), which generally excludes "[e]vidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual con-

[3] MRE 404 provides, in relevant part:

> (a) *Character evidence generally*. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> * * *
>
> (3) *Character of alleged victim of sexual conduct crime.* In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease[.]

duct . . . .” Defendant responded and also cross-appealed the trial court’s determination that evidence of DM’s pregnancy was admissible, seeking a determination that MRE 404(a)(3) and the rape-shield statute excluded the entirety of the evidence.

In a published opinion, the Court of Appeals determined that all the evidence was admissible. *People v Sharpe*, 319 Mich App 153, 173; 899 NW2d 787 (2017). As to the pregnancy and abortion evidence, the Court of Appeals held that MRE 404(a)(3) did not apply because MRE 404(a)(3) concerns the admissibility of character evidence and, here, the prosecutor was not seeking to introduce evidence of the pregnancy and abortion in order to demonstrate that DM acted in conformity with that character. *Id*. at 164-165, 171. The Court then concluded that while evidence of DM’s pregnancy and abortion was evidence of a specific instance of DM’s sexual conduct that would typically be barred by the rape-shield statute, the evidence was admissible under the rape-shield statute’s exception for evidence of the victim’s past sexual conduct with the actor. *Id*. at 165, 171. The Court further held that the evidence satisfied the remaining requirements of the rape-shield statute because the evidence was material to a fact at issue—whether sexual penetration occurred—and because the probative value of the evidence outweighed its prejudicial nature. *Id*. at 166, 172-173. Unlike the trial court, the Court of Appeals did not view the abortion evidence to be so prejudicial that it outweighed its probative value. *Id*. at 172-173.

As to the evidence concerning DM’s lack of other sexual partners, the Court of Appeals again concluded that the evidence did not fall under MRE 404(a)(3) because it was not introduced to demonstrate that DM acted in conformity with her lack of sexual partners.

Id. at 168. It further held that the evidence was not barred under the rape-shield statute because the statute excludes specific instances of sexual conduct, not the lack of specific instances of sexual conduct. *Id*. However, it noted that even if the lack of sexual conduct could be construed as specific instances of sexual conduct, the evidence would be admissible under the rape-shield statute's exception for evidence showing the origin of pregnancy. *Id*. at 169. The Court then held that the evidence was otherwise admissible under MRE 402 and MRE 403 because the evidence was relevant to and probative of whether intercourse occurred between DM and defendant and because the evidence was minimally prejudicial. *Id*. at 169-170. Consistently with this ruling, the Court reversed in part and affirmed in part the trial court's ruling and remanded the case to the trial court for further proceedings. *Id*. at 174.

Defendant sought leave to appeal in this Court. We granted leave to consider the following issues: (1) whether evidence related to the complainant's pregnancy, abortion, and lack of other sexual partners was within the scope of the rape-shield statute, MCL 750.520j(1); (2) if so, whether the evidence was nonetheless admissible under one of the exceptions set forth in MCL 750.520j(1); and (3) if not, whether the evidence was admissible under general rules governing the admissibility of evidence, such as MRE 402 and MRE 403.[4]

II. LEGAL BACKGROUND

A. STANDARD OF REVIEW

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Mardlin*, 487

[4] *People v Sharpe*, 501 Mich 899 (2017).

Mich 609, 614; 790 NW2d 607 (2010). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). To the extent that the trial court's evidentiary decision involves underlying questions of law, such as whether a statute precludes admissibility of evidence, this Court reviews those questions of law de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

B. STATUTORY BACKGROUND OF THE RAPE-SHIELD STATUTE

Until the late twentieth century, Michigan courts considered evidence of a woman's sexual history legally relevant in rape prosecutions. *People v LaLone*, 432 Mich 103, 123-124; 437 NW2d 611 (1989) (ARCHER, J., concurring in part and dissenting in part). Allegations of rape were perceived as easily fabricated, and, accordingly, a woman's chastity—or lack thereof—was believed to be probative of whether she consented to the sexual act at issue. *Id*. at 123-124 & n 14.[5] Unsurprisingly, this discouraged women from seeking prosecution of their assailants because they " 'fear[ed] that the trial proceedings would veer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition in which [the] complainant would be required to acknowledge and justify her sexual past.' " *People v Arenda*, 416 Mich 1, 9; 330 NW2d 814 (1982), quoting *People v Khan*, 80 Mich App 605, 613; 264 NW2d 360 (1978).

[5] However, in cases involving statutory rape, Michigan courts generally deemed such evidence irrelevant to the charge. See, e.g., *People v Russell*, 241 Mich 125, 126-127; 216 NW 441 (1927) ("The general rule is that the chastity or want of chastity of the prosecutrix under the age of consent is unimportant in a statutory rape case, and that testimony on that subject is, therefore, immaterial.").

In 1974, after facing significant criticism of the state's rape laws, the Michigan Legislature passed several reforms that redefined unlawful sexual conduct and created new evidentiary standards for these prosecutions. *LaLone*, 432 Mich at 124-125 (ARCHER, J., concurring in part and dissenting in part). Among these reforms was the rape-shield statute, MCL 750.520j. *Id*. MCL 750.520j serves to limit the admissibility of evidence of a complainant's sexual conduct and provides as follows:[6]

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

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[6] In addition to the enumerated exceptions within the rape-shield statute, evidence of a complainant's sexual conduct may be admitted to preserve the defendant's constitutional right to confrontation. See *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984).

The rape-shield statute "constitutes a legislative policy determination that sexual conduct or reputation regarding sexual conduct as evidence of character and for impeachment, while perhaps logically relevant, is not legally relevant." *People v Morse*, 231 Mich App 424, 429-430; 586 NW2d 555 (1998). The statute also reflects a belief that "inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury." *Arenda*, 416 Mich at 10. Finally, the statute protects the privacy of the alleged victim and, in so doing, removes an institutional discouragement from seeking prosecution. *Id*. at 10-11; *LaLone*, 432 Mich at 123-124 (ARCHER, J., concurring in part and dissenting in part). See also *Michigan v Lucas*, 500 US 145, 149-150; 111 S Ct 1743; 114 L Ed 2d 205 (1991) ("The Michigan statute represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.").

III. ANALYSIS

In the present case, the prosecutor sought admission of evidence of DM's pregnancy and abortion and DM's lack of other sexual partners through November 2014. There are two different alleged procedural bars to the admission of the evidence proffered by the prosecutor: the rape-shield statute and the Michigan Rules of Evidence. We consider them each in turn.

A. APPLICABILITY OF THE RAPE-SHIELD STATUTE

When interpreting a statute, our primary goal is to ascertain and give effect to the Legislature's intent. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). "If the statute's language is clear and unambiguous, we assume that the Legislature intended its

plain meaning and we enforce the statute as written." *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). In so doing, we assign each word and phrase its plain and ordinary meaning within the context of the statute. *People v Kowalski*, 489 Mich 488, 498; 803 NW2d 200 (2011); MCL 8.3a. We must also avoid any construction that would render any part of a statute surplusage or nugatory, if possible. *People v Rea*, 500 Mich 422, 428; 902 NW2d 362 (2017).

The rape-shield statute generally prohibits the admission of "[(1)] [e]vidence of specific instances of the victim's sexual conduct, [(2)] opinion evidence of the victim's sexual conduct, and [(3)] reputation evidence of the victim's sexual conduct . . . ." MCL 750.520j(1). Although the statute was enacted in response to the practice of impeaching the complainant's testimony with evidence of the complainant's sexual conduct, the plain language of the statute does not condition the exclusion of such evidence upon whether the evidence is offered by the prosecutor or by the defendant.[7] The statute's latter two categories of exclusion are not relevant here because the evidence offered by the prosecutor in this case does not constitute opinion or reputation evidence. Specifically, the proffered evidence consists of medical records of DM's pregnancy and abortion, DM's mother's testimony that DM became pregnant and obtained an abortion, and DM's testimony that she had no other sexual partners through November 2014. The prosecutor has not sought to offer witness testimony commenting on DM's sexual reputation or any witness's opinion of DM's sexual conduct.

[7] However, MCL 750.520j(2) only requires a written motion and offer of proof if such evidence is offered by the defendant. Accordingly, even if this evidence was subject to the rape-shield statute, the prosecutor was not required to move for its admission.

Remaining at issue is whether the offered evidence constitutes "[e]vidence of specific instances of the victim's sexual conduct." MCL 750.520j(1).[8] Because the rape-shield statute fails to define the term "specific instances," we may refer to a dictionary to help establish its plain meaning. See *Rea*, 500 Mich at 428. As the term "specific instances" is not a term of art, we use a lay dictionary to aid with interpretation. See *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007). *Random House Webster's College Dictionary* (2001) defines "instance" as "a case or occurrence of something" and defines "specific" as "specified, precise, or particular." Accordingly, a specific instance of the victim's sexual conduct must relate to a particular occurrence of the victim's sexual conduct.

Evidence of DM's pregnancy and her subsequent abortion are not evidence of a specific instance of the victim's sexual conduct. Although this evidence necessarily implies that sexual activity occurred that caused the pregnancy, the pregnancy and abortion are not evidence regarding a specific instance of sexual conduct. As we have previously stated, whether evidence falls within the purview of the rape-shield statute concerns whether the evidence "*amount*[s] to or *reference*[s] specific conduct," *People v Ivers*, 459 Mich 320, 329; 587 NW2d 10 (1998), not whether the evidence constitutes a consequence of or relates to sexual activity generally. In this case, the pregnancy and abortion evidence alone does not describe a particular or specific sexual encounter. The evidence demonstrates only that at least one act of sexual intercourse occurred in 2014

[8] We do not adopt Chief Justice MARKMAN's definition of the term "conduct" as expressed in his concurring opinion for the reasons noted by Justice YOUNG in *People v Parks*, 483 Mich 1040 (2009) (YOUNG, J., concurring).

and does not describe one particular occurrence of sexual conduct. Because DM's pregnancy and abortion are not evidence of a particular occurrence of sexual conduct, evidence thereof does not fall under the purview of the rape-shield statute, and the Court of Appeals erred in determining otherwise. See *Kowalski*, 489 Mich at 498.

The conclusion that pregnancy and abortion are not themselves specific instances of the victim's sexual conduct is bolstered by a reading of MCL 750.520j as a whole. "[W]ords and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole," and "a word or phrase should be given meaning by its context or setting." *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014) (quotation marks and citation omitted; alteration in original). MCL 750.520j(1) explains that specific instances of the victim's sexual conduct shall not be admitted, but MCL 750.520j(1)(b) excepts relevant "[e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." These specific instances of sexual conduct may be used to "show," or "cause or permit to be seen," *Merriam-Webster's Collegiate Dictionary* (11th ed), the "origin of semen, pregnancy, or disease." In so phrasing the statute, the Legislature has distinguished between the specific instance of sexual activity that shows the *origin* or the *source* of the semen, pregnancy, or disease—i.e., whatever sexual act led to these consequences—and the semen, pregnancy, or disease itself. Accordingly, the Legislature has *ipso facto* made clear that semen, pregnancy, or disease, while perhaps related to sex, are not themselves the specific instances of sexual conduct envisioned by MCL 750.520j. And because pregnancy, and by extension abortion, is not a specific instance of

sexual conduct, neither pregnancy nor abortion falls within the rape-shield statute.

Similarly, evidence that DM did not engage in other sexual intercourse in 2014 does not fall within the plain language of the rape-shield statute. This evidence demonstrates an absence of conduct, not a "specific instance" of sexual conduct.[9] Excluding evidence of a lack of sexual partners under the rape-shield statute would render the phrase "specific instances" meaningless. See *Rea*, 500 Mich at 428. We must give effect to all words in the statute, and, accordingly, the Court of Appeals properly determined that DM's lack of other sexual partners does not fall within the scope of the rape-shield statute.

Finally, we note that this conclusion is consistent with the purposes of the rape-shield statute. The rape-shield statute was designed to prevent unwelcome and unnecessary inquiry into a complainant's sexual activities, thereby protecting the complainant's privacy and protecting the complainant from suffering unfair prejudice based on her sexual history. See *Arenda*, 416 Mich at 10. But here, the complainant has voluntarily offered evidence of her pregnancy, abortion, and lack of sexual history to bolster her allegations of criminal sexual conduct against defendant. There is no indication from our Legislature or in our caselaw that the rape-shield statute was designed to prevent a

[9] To the extent that defendant cites caselaw from Minnesota and Wisconsin wherein courts held that evidence demonstrating a lack of sexual conduct was prohibited under the rape-shield statutes in those states, we note that Minnesota's and Wisconsin's statutes do not contain the phrase "specific instances" and, accordingly, we find this caselaw unpersuasive. See Minn Stat § 609.347(3) (referring to "evidence of the victim's previous sexual conduct" generally); Wis Stat § 972.11(2)(b) (using the phrase "*any evidence* concerning the complaining witness's prior sexual conduct") (emphasis added).

complainant's disclosure of her own sexual history or its attendant consequences.[10] Accordingly, giving effect to the plain language of the statute and to the Legislature's intent in enacting the rape-shield statute, we hold that the entirety of the evidence offered here is not subject to the rape-shield statute. See *Gardner*, 482 Mich at 50.

B. APPLICATION OF MRE 402 AND MRE 403

Because the offered evidence is not excluded under the rape-shield statute, we now analyze whether the evidence is otherwise admissible under the Michigan Rules of Evidence. Generally, relevant evidence is admissible. MRE 402; *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence may be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. The weighing of evidence's probative value against its prejudicial effect requires a balancing of several factors, including the necessary time to present the evidence, whether the evidence is needlessly cumulative, how directly probative the evidence is, how necessary the fact to be proven by the

[10] Although we conclude that the evidence offered is not rendered inadmissible by the rape-shield statute, we offer a note of caution to prosecutors who seek to introduce this type of evidence. As we have stated before, the admission of evidence typically barred by the rape-shield statute "may be required to preserve a defendant's constitutional right to confrontation." *Hackett*, 421 Mich at 348. The admission of this type of evidence may open the door to the introduction of evidence whose admission may otherwise have been precluded by the rape-shield statute.

evidence is, whether the evidence would mislead the jury, and whether there is an alternative and less potentially harmful way to prove the fact. *Blackston*, 481 Mich at 462.[11]

The offered evidence is relevant under MRE 402. Evidence of DM's pregnancy, abortion, and lack of other sexual partners makes it more probable that defendant sexually assaulted DM. Evidence showing that DM, a 14-year-old child, became pregnant is highly probative of the allegation that DM was sexually assaulted. See *People v Borowski*, 330 Mich 120, 126; 47 NW2d 42 (1951). It also provides context for DM's disclosure of the sexual assault: DM did not originally disclose the sexual assault but only did so after she discovered that she was pregnant and after repeated questioning by her mother regarding the identity of who impregnated DM. The evidence of DM's abortion corroborates that DM was impregnated and explains the lack of DNA evidence to identify the man who impregnated DM. Further, defendant's offering to pay for half of the cost of the abortion may demonstrate defendant's consciousness of guilt or desire to destroy evidence. To the extent that defendant presents alternative theories for why he paid for half of DM's abortion, we note that the standard for probative force is minimal, *People v Crawford*, 458 Mich 376, 390; 582

[11] We note that the trial court's MRE 402 and MRE 403 analysis did not sufficiently address the basis of its decision to exclude the evidence of abortion and the lack of sexual partners. Cf. *People v Johnigan*, 265 Mich App 463, 469-470; 696 NW2d 724 (2005) (opinion by SAWYER, J.); *Woodington v Shokoohi*, 288 Mich App 352, 357; 792 NW2d 63 (2010). To the extent that the trial court based its ruling excluding evidence of the lack of sexual partners and the abortion on MRE 404(a)(3), that was an abuse of discretion. MRE 404(a) only excludes character evidence used to prove conformity to a character trait. The prosecutor, however, articulated valid, nonpropensity explanations for the evidence of lack of sexual partners and the abortion.

NW2d 785 (1998), and that defendant may present any one of the reasonable alternative reasons for payment to the jury, who will then weigh this evidence. And finally, evidence demonstrating that DM had no sexual partners other than defendant through November 2014 is, by simple process of elimination, probative of the identity of the person who impregnated DM.

The probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, and therefore, the evidence is not inadmissible under MRE 403. The evidence of DM's pregnancy and abortion definitively demonstrates that sexual penetration occurred. If the jury finds credible DM's testimony that she did not engage in sexual intercourse with anyone other than defendant through November 2014, that testimony proves that defendant was the man who sexually assaulted DM. Accordingly, this evidence is highly probative.

The danger of unfair prejudice created by the evidence does not substantially outweigh this high probative value. All relevant and material evidence is prejudicial; we are concerned only with unfairly prejudicial evidence that may be given inappropriate weight by the jury or involve extraneous considerations. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). We agree with the Court of Appeals that abortion evidence, while perhaps incendiary to some, is not so inherently prejudicial in today's society as to render it inadmissible. See *State v Stanton*, 319 NC 180, 186; 353 SE2d 385 (1987) ("The mere fact that an abortion took place is not so inflammatory as to render it inadmissible."). Although there may be some danger of juror sympathy for a young woman who has gone through pregnancy and abortion or, alternatively, a danger of juror revulsion for a young woman choosing

abortion, the evidence here is both highly probative and concise. And to the extent that the abortion evidence could be viewed as cumulative of the evidence of DM's pregnancy, it also serves the purpose of explaining why the prosecutor is unable to offer DNA evidence to prove the identity of the man who impregnated DM. If the abortion evidence were not admitted, the jury might be left to speculate as to why DNA is unavailable and whether the pregnancy came to term.

As for the lack of sexual partners, Michigan courts have generally taken a dim view on this evidence. See *People v Stull*, 127 Mich App 14, 18; 338 NW2d 403 (1983); *People v Bone*, 230 Mich App 699, 702; 584 NW2d 760 (1998); *People v Khan*, 80 Mich App 605, 621; 264 NW2d 360 (1978). But those cases involved efforts to use a victim's lack of sexual history to support arguments about the victim's credibility or, alternatively, about consent. In this case, the prosecution has concisely alleged a valid purpose: the lack of sexual partners eliminates the possibility that someone other than defendant impregnated DM. Moreover, at the time of trial, the trial court has the ability to provide a limiting instruction to the jury concerning the use of this evidence.

Given the high probative value of the evidence of DM's pregnancy, abortion, and lack of other sexual partners through November 2014, and its low danger of unfair prejudice, the evidence is admissible under MRE 402 and MRE 403.

IV. CONCLUSION

We hold that evidence of DM's pregnancy, abortion, and lack of other sexual partners through November 2014 does not fall under the rape-shield statute. Further, this evidence is otherwise admissible under

MRE 402 and MRE 403. We therefore affirm the result reached by the Court of Appeals—allowing the admission of this evidence—but we do so for the reasons stated in this opinion, and we remand this case to the trial court for further proceedings consistent with this opinion.

ZAHRA, MCCORMACK, VIVIANO, and WILDER, JJ., concurred with CLEMENT, J.

MARKMAN, C.J. (*concurring*). I agree with the majority that evidence of the complainant's pregnancy, abortion, and lack of other sexual partners is not subject to the rape-shield statute, MCL 750.520j, and is admissible under the Michigan Rules of Evidence. However, I reach the conclusion that evidence of the complainant's pregnancy and evidence of the abortion are not subject to the rape-shield statute for different reasons than the majority. In all other respects, I agree with the majority's conclusions and its reasoning.

The rape-shield statute, MCL 750.520j, provides, in pertinent part:

> (1) Evidence of specific instances of the *victim's sexual conduct*, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.[1]

[1] " '[P]ast' sexual conduct refers to conduct that has occurred before the evidence is offered at trial." *People v Adair*, 452 Mich 473, 483; 550 NW2d 505 (1996).

> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [Emphasis added.]

The majority holds that "[e]vidence of DM's pregnancy and her subsequent abortion are not evidence of a specific instance of the victim's sexual conduct" because "[a]lthough this evidence necessarily implies that sexual activity occurred that caused the pregnancy, the pregnancy and abortion are not evidence regarding a specific instance of sexual conduct." Although I agree with the majority's conclusion that "[e]vidence of DM's pregnancy and her subsequent abortion are not evidence of a specific instance of the victim's sexual conduct," I reach this conclusion for different reasons. While the majority focuses on the language "specific instances" to reach this conclusion, I would focus on the language "victim's sexual conduct." In other words, I believe that while the pregnancy and abortion are, in fact, evidence of a *specific instance* of sexual conduct, they are not evidence of a specific instance of the *victim's* sexual conduct.

As the majority recognizes, there were two allegations of sexual penetration, but one of these "alleged sexual encounter[s] could not have been the source of DM's pregnancy" due to its timing. That leaves one alleged sexual penetration that still could have been the source of DM's pregnancy. Therefore, contrary to the majority's assertion, both evidence of DM's pregnancy and evidence of DM's abortion are evidence of a "specific instance" of sexual conduct. Indeed, if the majority were correct that the pregnancy and abortion are not such evidence, I do not see how the majority can later conclude, as it does, that this evidence is relevant—much less "highly probative"—evidence.[2]

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[2] In Part III(B) of its opinion, the majority correctly concludes that the proffered evidence is relevant under MRE 402 and that its probative

The pregnancy and the abortion are either evidence of the one alleged penetration that *could* have resulted in DM's pregnancy, or they are not. If they are, then the pregnancy and abortion are evidence of a specific instance of sexual conduct, but, if they are not, then the pregnancy and abortion are not even relevant—let alone "highly probative"—evidence. For these reasons, as well as for those set forth in Part III(B) of the majority's opinion, I conclude that the pregnancy and abortion are evidence of a specific instance of sexual conduct.[3]

However, as mentioned earlier, I believe that such evidence is not evidence of the "victim's sexual con-

value is not substantially outweighed by the danger of unfair prejudice under MRE 403. As it explains, "[e]vidence of DM's pregnancy, abortion, and lack of other sexual partners makes it more probable that defendant sexually assaulted DM." Indeed, as the majority further explains, this evidence is "highly probative" because the "evidence of DM's pregnancy and abortion definitively demonstrates that sexual penetration occurred" and "[i]f the jury finds credible DM's testimony that she did not engage in sexual intercourse with anyone other than defendant through November 2014, that testimony proves that defendant was the man who sexually assaulted DM." In light of these conclusions, how can the majority conclude at the same time that this evidence is not evidence of a "specific instance" of sexual conduct?

[3] While I agree with the majority that "pregnancy and abortion are not themselves specific instances of the victim's sexual conduct" (or *anyone's* sexual conduct for that matter), what the majority fails to recognize is that the rape-shield statute applies not just to specific instances of sexual conduct themselves, but more broadly to "[*e*]*vidence of* specific instances of the victim's sexual conduct," MCL 750.520j(1), and, as the majority does recognize (at least later in its opinion), DM's pregnancy and abortion are indeed evidence of a specific instance of sexual conduct, i.e., the evidence of her pregnancy and abortion "makes it more probable that defendant sexually assaulted DM." And the fact that the rape-shield statute contains an exception for "[e]vidence of specific instances of sexual activity showing the source or origin of . . . pregnancy," MCL 750.520j(1)(b), demonstrates that the rape-shield statute generally applies to evidence of a pregnancy because, if it did not as the majority alleges, there would be no need to include an exception for evidence of pregnancy.

duct." As I stated in my dissenting statements in *People v Piscopo*, 480 Mich 966 (2007),[4] and *People v Parks*, 483 Mich 1040 (2009),[5] "conduct" refers only to "volitional actions" and thus "does not encompass *involuntary* acts such as those that stem from being subjected to sexual abuse." *Parks*, 483 Mich at 1060 (MARKMAN, J., dissenting).[6]

As I stated in *Parks*, 483 Mich at 1059-1062 (MARKMAN, J., dissenting):

> This statute only excludes evidence of the "victim's sexual conduct." Thus, any inquiry into the statute's application must focus on the meaning of "conduct." The ordinary meaning of "conduct" is harmonious with the Legislature's use of "conduct" throughout the enacting legislation, 1974 PA 266, and with the Legislature's pur-

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[4] In *Piscopo*, the Court denied leave to appeal and I, joined by Justice CAVANAGH, dissented. In that case, the defendant (a pastor) sought to admit evidence that the complainant had made prior false allegations of sexual abuse against another pastor and that the complainant also claimed to have been raped by a demon. I would have reversed the trial court's decision that barred the admission of this evidence.

[5] In *Parks*, this Court denied leave to appeal. Justice YOUNG wrote a concurring statement, Chief Justice KELLY wrote a dissenting statement (focused exclusively on the Confrontation Clause), and I wrote a dissent that Justice CAVANAGH again joined. In that case, the defendant sought to introduce evidence that prior to her allegations against the defendant, the complainant had alleged that her step-grandfather sexually abused her. This was relevant because during the trial the complainant described sexual acts that a child of her age typically would not have knowledge of or be able to describe and the medical doctor who examined the complainant after her allegations against her step-grandfather and after her allegations against the defendant testified that the complainant's history led him to believe that she had been abused. I would have reversed the trial court's decision that barred the admission of the evidence of the complainant's past sexual abuse.

[6] See also *People v Duenaz*, 498 Mich 969, 969 (2016) ("[W]e encourage the Legislature to clarify whether evidence of prior sexual abuse constitutes 'sexual conduct' within the meaning of the rape-shield statute, MCL 750.520j.").

poses in enacting the rape-shield statute. Each of these interpretative guides strongly suggests that "conduct" refers only to *volitional* actions by the victim and does not encompass *involuntary* acts such as those that stem from being subjected to sexual abuse.

The definition of "conduct" varies little from dictionary to dictionary. Conduct is defined as: "personal behavior; way of acting; deportment," *Random House Webster's College Dictionary* (1997); "[t]he way a person acts; behavior," *The American Heritage Dictionary of the English Language* (1981); and "[t]he manner of guiding or carrying one's self; personal deportment; mode of action; behavior," *Webster's Revised Unabridged Dictionary* (1996). The common theme of these definitions is that "conduct" pertains to an individual's own behavior, to actions initiated or set in motion *by* the individual. Being the *victim* of, or having been *subjected* to, sexual abuse by *another* does not by this definition of "conduct" constitute something within the scope of the rape-shield statute, and therefore should not be excluded from evidence under the authority of this statute.[7]

This interpretation of "conduct" is further supported by the Legislature's use of "conduct" throughout the rape-shield statute. If "conduct" is read to include abuse perpetrated *against* the victim by *other* persons, then references in the statute, MCL 750.520j(1), to "opinion evidence of the victim's sexual conduct" and "reputation evidence of the victim's sexual conduct" make no sense. Reputation and opinion evidence are typically based on a person's character, such as the person's tendency for aggression. A person's character and conduct are similar at least in the sense that they are each formed by voluntary decisions made by that individual. Actions concerning which an individual has no control cannot be

[7] For example, one would not ordinarily describe a rape victim as having "engaged in" or "taken part in" sexual conduct. And it would be equally odd for a speaker of American English to assert, for example, that a rape victim "reflected upon the trauma she had incurred as the result of her sexual conduct" or that the victim "testified at trial as to her own sexual conduct suffered at the hands of the defendant."

said to establish a person's character, so when the Legislature extended protection from reputation and opinion evidence in MCL 750.520j(1), it likely understood that such evidence could only apply with respect to a victim's sexual history over which the victim has control. Thus, the ordinary volitional understanding of "conduct" also fits within the context in which it is used in the rape-shield statute, whereas a broader definition, encompassing non-volitional behavior, including sexual abuse by others, does not.

The statute provides additional insight on the meaning of "conduct" by distinguishing "conduct" from "activity" in paragraphs (a) and (b) of MCL 750.520j(1). These paragraphs set forth two exceptions to the general inadmissibility of evidence regarding a "victim's sexual conduct" in subsection (1). Paragraph (a) renders admissible evidence of the "victim's past sexual *conduct* with the actor," and paragraph (b) renders admissible "specific instances of sexual *activity*" concerning the "source or origin of semen, pregnancy, or disease." "Activity" does not connote the concept of volition to the same extent as "conduct." "Activity" in paragraph (b) pertains to conditions that directly result from the physical sex act itself—semen, pregnancy, disease—in which the concept of volition is essentially irrelevant. In contrast, "conduct" in paragraph (a) pertains to a range of interpersonal behavior that extends beyond the physical act itself, and in which the concept of volition may be quite relevant in assessing whether the victim chose to behave in such a way that the defendant should be deemed less culpable, or not culpable at all, for the alleged offense. Interpreting "conduct" to include non-volitional action blurs the Legislature's apparently careful distinction between "conduct" and "activity."

The Legislature's use of "conduct" throughout 1974 PA 266 further supports interpreting "conduct" to include only volitional actions. See, e.g., MCL 750.520b (describing first-degree criminal sexual "conduct"). It seems un-

likely that the Legislature intended to punish nonvolitional activity under the criminal code.[8] Interpreting "conduct" to mean only volitional action maintains this understanding. "Identical language should receive identical construction when found in the same act."

Further uses of "conduct" in 1974 PA 266 are found in MCL 750.520a, in which the Legislature defined "actor" as "a person accused of criminal sexual conduct," MCL 750.520a(a), and "victim" as "the person alleging to have been subjected to criminal sexual conduct," MCL 750.520a(s). These definitions distinguish a person who has *chosen* to perform a certain act from one who had *no* choice in performing such act. If a victim, for example, is raped by an actor, the rape is considered to be the *actor's* conduct. The victim is considered to have been "*subjected to*" the conduct, strongly suggesting that rape is not fairly characterized as the *victim's* conduct. Rather, it would only be the "conduct" of the person who *chose* to perform the act.

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[8] Under MCL 750.520b(1)(b), "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [t]hat other person is at least 13 but less than 16 years of age" and one of several enumerated aggravating circumstances exists, such as "[t]he actor is a member of the same household as the victim." As I stated in *Piscopo*, 480 Mich at 970 (MARKMAN, J., dissenting), in regards to MCL 750.520d, which is very similar to MCL 750.520b,

> MCL 750.520d states that a person is guilty of "criminal sexual conduct in the third degree" if that person
>
> > engages in sexual penetration with another person and if any of the following circumstances exist:
> >
> > (a) [t]hat other person is at least 13 years of age and under 16 years of age.

If "conduct" referred to passive or involuntary activity, then a girl who was raped by a 15-year-old boy would *herself* be guilty of third-degree [criminal sexual conduct] under the law. However, such an outcome would obviously be absurd and illogical. Hence, the use of "conduct" throughout the relevant statute suggests strongly that the Legislature must have intended "conduct" to refer to volitional behavior and that the term does not encompass involuntary sexual abuse.

> The overall purpose of the rape-shield statute also supports understanding "conduct" by its normal definition to encompass only volitional activity. MCL 750.520j was clearly enacted to prevent the introduction of embarrassing evidence regarding the victim's sexual history at trial. Such prohibition, it was hoped, would increase the likelihood that sexual assault victims would report such assaults and not be deterred from doing so by the prospect of embarrassment. Yet, reading the rape-shield statute to exclude evidence regarding past *abuse* suffered by the victim bears no apparent relationship to this purpose. While any person may well be uncomfortable about revealing past instances in which he or she was sexually abused, such uneasiness is sharply distinct from the kind of embarrassment that rape-shield statutes were designed to foreclose—embarrassment caused as a function of one's *own* misbehavior or questionable conduct. [Citation omitted.]

Not only is this the more textually grounded approach to giving meaning to MCL 750.520j, but it is also the approach that best facilitates the production of evidence, which is the "lifeblood of the criminal justice process . . . and indispensable in ensuring fair and just [jury] determinations." *People v Goldston*, 470 Mich 523, 546; 682 NW2d 479 (2004) (MARKMAN, J., concurring).

In the instant case, the proffered evidence relates to defendant's sexual abuse of DM; thus, the rape-shield statute does not apply. More specifically, the prosecutor is seeking to introduce evidence that DM was pregnant, obtained an abortion, and did not have sexual intercourse with anybody other than defendant.[9] This evidence, if believed by the jury, seemingly proves that defendant sexually abused DM. However, evidence of

[9] DM was 14 years old at the time of the abuse and thus was legally unable to give consent. See *People v Starks*, 473 Mich 227, 235; 701 NW2d 136 (2005); MCL 750.520b; MCL 750.520c; MCL 750.520d; MCL 750.520e.

sexual abuse is not tantamount to evidence of the "victim's sexual conduct" and thus is not subject to the rape-shield statute.

Again, I agree with the majority that evidence of DM's pregnancy, abortion, and lack of other sexual partners is not subject to the rape-shield statute and is admissible under the Michigan Rules of Evidence. However, I believe that evidence of DM's pregnancy and evidence of the abortion are not subject to the rape-shield statute for different reasons than the majority. In all other respects, I agree with the majority's conclusions and its reasoning.

BERNSTEIN, J. (*concurring in part and dissenting in part*). I respectfully dissent in part from this Court's opinion, which affirms the disposition of the Court of Appeals on other grounds. This case deals with three separate pieces of evidence: (1) the complainant DM's pregnancy; (2) DM's subsequent abortion; and (3) DM's lack of other sexual partners during the relevant time period. The trial court held that only evidence of DM's pregnancy is admissible, but this Court would instead find that all three pieces of evidence are admissible. I agree with the majority that evidence of DM's abortion and her lack of other sexual partners is not governed by the rape-shield statute and that evidence of DM's lack of other sexual partners is admissible under our rules of evidence. However, I would hold that evidence of DM's pregnancy is governed by the rape-shield statute, MCL 750.520j, and that evidence of DM's abortion is barred by MRE 402 and MRE 403.

First, I agree with the Court of Appeals' implicit holding that the trial court abused its discretion in finding that some of the evidence is inadmissible under MRE 404(a)(3), because the prosecutor does not seek to

introduce this evidence as character evidence. Instead, we must then consider whether any of this evidence is admissible under the rape-shield statute.

The first question in considering admissibility under the rape-shield statute is whether the proffered evidence is "[e]vidence of specific instances of the victim's sexual conduct . . . ." MCL 750.520j(1). I agree with the majority that evidence of DM's abortion and DM's lack of other sexual partners does not fall under the rape-shield statute, as that evidence is not evidence of specific instances of the victim's sexual conduct. However, I believe that evidence of DM's pregnancy does fall under the rape-shield statute.

The majority states that "the pregnancy . . . evidence alone does not *describe* a particular or specific sexual encounter. The evidence demonstrates only that at least one act of sexual intercourse occurred in 2014 and does not *describe* one particular occurrence of sexual conduct." (Emphasis added.) The focus on the verb "describe" here is curious, given that it does not appear anywhere in the statute. Rather, the plain language of MCL 750.520j simply requires that the proffered evidence be "evidence" of a *specific instance* of the victim's sexual conduct. For the reasons stated in Chief Justice MARKMAN's concurring opinion, I would find that evidence of DM's pregnancy is evidence of a *specific instance* of the victim's sexual conduct—the particular sexual encounter that resulted in the pregnancy.[1] As Chief Justice MARKMAN points out, evidence of DM's pregnancy must be presented as evidence of a

[1] Although I believe Chief Justice MARKMAN raises an interesting point concerning the meaning of "sexual conduct" in the rape-shield statute, the prosecutor here specifically argued that "conduct" includes both voluntary and involuntary behavior, and I would thus leave this question for another day.

specific instance of sexual penetration, or else it is irrelevant; if it is *not* evidence of a specific instance of sexual penetration, then how would it add anything to the criminal trial against defendant? In other words, because the prosecutor charged defendant with one of the counts of first-degree criminal sexual conduct based on an allegation that a specific instance of sexual penetration resulted in DM becoming pregnant, I would find that DM's pregnancy is being presented as evidence of a specific instance of the victim's sexual conduct and evidence of that pregnancy thus falls within the rape-shield statute.

Evidence that falls under the rape-shield statute generally shall not be admitted, subject to two exceptions. The second exception, concerning "[e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease," is clearly inapplicable here, as the mere fact of a pregnancy cannot, by itself, show the *source* of semen or pregnancy, and there is nothing to suggest that a disease is at issue. MCL 750.520j(1)(b).[2]

The first exception, concerning "[e]vidence of the victim's past sexual conduct with the actor," presents a

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Because I believe that evidence of an abortion is one step more attenuated from a specific instance of sexual conduct than evidence of a pregnancy is, I agree with the majority's conclusion that evidence of an abortion does not fall under the rape-shield statute, despite otherwise agreeing with Chief Justice MARKMAN's reading of the plain language of the statute.

[2] Contrary to the majority's reasoning, I do not believe that reading the exception in MCL 750.520j(1)(b) alongside MCL 750.520j(1) leads to the conclusion that pregnancy is not evidence of a specific instance of sexual conduct. While MCL 750.520j(1)(b) does no work in this context, because evidence of a pregnancy is not evidence of the source of itself, that does not change the fact that it is evidence of a specific instance of sexual conduct.

more difficult question. MCL 750.520j(1)(a). Clearly, the prosecutor argues that DM's pregnancy is evidence of DM's past sexual conduct with defendant. However, testimony presented about defendant's alleged sexual abuse appears to conflict with the timing of the pregnancy. There are two alleged instances of sexual penetration, one of which the majority concedes could not have been the source of DM's pregnancy, given the timing. But the timing of the other alleged instance of sexual penetration has not yet been firmly established, and defendant alleges that the timing of both instances does not coincide with the timing of DM's pregnancy. Because the plain language of the first exception notes that only evidence of the victim's past sexual conduct *with the actor* is potentially admissible, I would find that the rape-shield statute requires the prosecutor to support its assertion that DM's pregnancy is linked to past sexual conduct with defendant. Said differently, *before* evidence of DM's pregnancy can be deemed admissible under the first exception to the rape-shield statute, I would hold that the prosecutor needs to make a threshold showing in the trial court that this evidence concerns past sexual conduct *with defendant*. The timing of the second alleged instance of sexual penetration has still not been established, and without an idea of the relevant time frame, it is only through mere speculation that one can connect DM's pregnancy to sexual conduct with defendant. Accordingly, I would instead remand to the trial court to allow the prosecutor to make this preliminary showing before the admissibility of evidence of DM's pregnancy is determined.

Turning next to evidence of DM's subsequent abortion, I would find that it is barred by MRE 402 and MRE 403. As an initial matter, should evidence of DM's pregnancy be excluded, the evidence of the abortion would cease to be relevant to the extent it is needed to

explain why no DNA evidence is available.[3] Evidence of DM's abortion would, of course, tend to show that sexual penetration with *someone* had occurred, and would thus be minimally relevant for that purpose. However, in considering the balancing test presented in MRE 403, which states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice," the majority focuses solely on the potential prejudice that might fall on DM, not defendant. Given that it is defendant who argues against admission of this evidence because of the potential prejudice to his criminal case, the focus should be on the effect of this evidence on defendant. See *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994) ("This unfair prejudice [of MRE 403] refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock.") (quotation marks and citation omitted).

Abortion remains a subject of fierce political and *moral* debate in modern society, which is not fully captured by the decades-old caselaw on which the majority opinion relies. Although juror sympathies might split more evenly when considering a minor who chooses an abortion after alleged sexual abuse, I find it hard to believe the same would be true when considering defendant, a grown man accused of sexually abusing a minor. Considered in this light, I believe that evidence of DM's abortion would not be highly probative, but would subject defendant to unfair prejudice,

[3] However, given the many ways in which a pregnancy may sadly be terminated without medical intervention, this argument about relevance does not appear to be particularly strong, even if evidence of the pregnancy is admitted.

and I would hold that such evidence should be excluded under MRE 403.

I agree with the majority that evidence of DM's abortion and lack of other sexual partners is not governed by the rape-shield statute and that DM's lack of other sexual partners is admissible under the Michigan Rules of Evidence. However, I continue to believe that evidence of DM's pregnancy is governed by the rape-shield statute, and that the prosecutor must make a threshold showing that the pregnancy is tied to the specific instance of sexual penetration of which defendant is being accused in order for that evidence to be admissible under MCL 750.520j(1)(a). I also believe that evidence of DM's abortion would subject defendant to unfair prejudice, and should therefore be excluded under MRE 403.

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket Nos. 154524 and 154526. Argued on application for leave to appeal March 6, 2018. Decided July 17, 2018.

South Dearborn Environmental Improvement Association, Inc. (South Dearborn) and several other environmental groups petitioned the Wayne Circuit Court for judicial review of a decision of the Department of Environmental Quality (DEQ) to issue a permit to install (PTI) for an existing source under the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. In 2006, the DEQ issued Severstal Dearborn, LLC (Severstal) a PTI that authorized the rebuilding of a blast furnace and the installation of three air pollution control devices at Severstal's steel mill. In the years that followed, the permit was revised twice; each successive permit modified and replaced the preceding permit. Emissions testing performed in 2008 and 2009 revealed that several emission sources at the steel mill exceeded the level permitted. The DEQ sent Severstal a notice of violation, and after extended negotiations, they entered into an agreement, pursuant to which Severstal submitted an application for PTI 182-05C, the PTI at issue in this case. The DEQ issued the permit on May 12, 2014, stating that the purpose of PTI 182-05C was to correct inaccurate assumptions about preexisting and projected emissions and to reallocate emissions among certain pollution sources covered by the PTI. On July 10, 2014, 59 days after PTI 182-05C was issued, South Dearborn and several other environmental groups appealed the DEQ's decision in the circuit court. AK Steel Corporation (AK Steel) purchased the steel mill a short time later and moved to dismiss the action, arguing that the circuit court lacked jurisdiction over the appeal because South Dearborn's petition was untimely filed. According to AK Steel, South Dearborn's right to appeal a PTI for an existing source was based in MCL 600.631 of the Revised Judicature Act, MCL 600.101 *et seq*., and therefore the period in which to file an appeal was governed by MCR 7.123(B)(1) and MCR 7.104(A), which require that an appeal be filed within 21 days after the issuance of the permit. The court, Daniel A. Hathaway, J., denied AK

Steel's motion to dismiss, holding that South Dearborn's petition for judicial review was timely filed because MCL 324.5506(14) governed the PTI appealed in this case and, therefore, South Dearborn had 90 days to file the petition. AK Steel appealed in the Court of Appeals, and the Court of Appeals, RIORDAN, P.J., and SAAD and M. J. KELLY, JJ., affirmed the result but on different grounds, holding that the appeals period outlined in MCL 324.5506(14) applies only to operating permits and that MCL 600.631 and MCR 7.119 governed this appeal because, in its view, the contested-case provisions of the Administrative Procedures Act (APA), MCL 24.201 *et seq*., applied to the permitting decision pursuant to MCL 24.291(1). Accordingly, the Court of Appeals held that the petition was timely because it was filed within the 60-day period provided by MCR 7.119 and MCR 7.104(A). 316 Mich App 265 (2016). AK Steel sought leave to appeal in the Supreme Court, and the DEQ filed a separate application raising nearly identical arguments. The Supreme Court consolidated the applications and scheduled oral argument on whether to grant the applications or take other action. 500 Mich 966 (2017).

In an opinion by Justice BERNSTEIN, joined by Justices MCCORMACK, VIVIANO, and CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

The final sentence of MCL 324.5505(8) recognizes the right to judicial review of the issuance or denial of a permit to install for an existing source in accordance with MCL 600.631 and provides that an appeal of such a permit action is governed by MCL 324.5506(14). MCL 324.5506(14) provides 90 days to seek judicial review of a decision to issue or deny a permit to install for an existing source. A petition for judicial review of the issuance or denial of any of the types of permits for an existing source that are governed by MCL 324.5505 and MCL 324.5506 must be filed within 90 days of the DEQ's final permit action. Accordingly, the trial court correctly denied AK Steel's motion to dismiss because the petition for judicial review was timely filed. Given that decision, Part III(B) of the Court of Appeals opinion was vacated as moot.

1. The final sentence of MCL 324.5505(8) provides that appeals of permit actions for existing sources are subject to MCL 324.5506(14). The plain language of this sentence indicates that a court must turn to MCL 324.5506(14) for the rules governing appeals of permit actions for an existing source, including appeals in the circuit court in accordance with MCL 600.631. The last sentence of MCL 324.5505(8) does not merely notify the reader of the contents of MCL 324.5506(14); reading the last sentence as a

mere descriptor of the contents of MCL 324.5506(14) would strip it of any independent meaning or legal purpose. Rather, by saying that appeals of permit actions for existing sources are "subject to" MCL 324.5506(14), the last sentence of MCL 324.5505(8) instructs the reader that a right to appeal certain permit actions for an existing source, including a right to appeal in the circuit court in accordance with MCL 600.631, exists and is subject to MCL 324.5506(14). By using the phrase "subject to" in MCL 324.5505(8), the Legislature indicated its intent that MCL 324.5505(8) and MCL 324.5506(14) be read together, not in isolation. Reading MCL 324.5505(8) as working with MCL 324.5506(14) gives the full text of both statutes independent meaning and avoids reducing the final sentence of MCL 324.5505(8) to a mere descriptor of the next section. Additionally, the general reference to "permit actions" in the final sentence of MCL 324.5505(8), rather than a reference to a specific type of permit, indicates that appeals of all three permit types listed in the first sentence of MCL 324.5505(8) are contemplated. Accordingly, appeals of permit actions that are subject to MCL 324.5506(14) include, at a minimum, appeals of the issuance or denial of a permit to install, a general permit, or a permit to operate for an existing source.

2. The fourth sentence of MCL 324.5506(14) provides that a petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action. The term "a permit" does not only refer to the operating permits described in the immediately preceding sentence of MCL 324.5506(14), which provides, in pertinent part, that any person may appeal the issuance or denial of an operating permit in accordance with MCL 600.631. Rather, MCL 324.5506(14) must be read together with MCL 324.5505(8), and the cross-reference in MCL 324.5505(8) to MCL 324.5506(14) demonstrates that appeals of the issuance or denial of a permit are subject to MCL 324.5506(14) when the permit is for an existing source. Furthermore, the presence of the indefinite article "a" preceding the word "permit" in MCL 324.5506(14) suggests that the statute refers to more than one type of permit. Had the Legislature intended the fourth sentence of MCL 324.5506(14) to refer only to operating permits, then it would have used that specific term, or another restrictive term, rather than the general phrase "a permit." Four permit types are mentioned by name in MCL 324.5505(8) and MCL 324.5506(14), which indicates that the Legislature knew how to be specific when it so intended. Moreover, when the Legislature wanted to use "permit" to refer to a particular previously referenced permit,

it used more restrictive language; for instance, the first sentence of MCL 324.5506(14) lists three types of permits that an owner or operator of an emission source might possess and instructs how "such a permit" and "his or her permit" may be reviewed when referring back to those specific permits. Because the fourth sentence of MCL 324.5506(14) refers to "a permit," this nonrestrictive language refers to any of the four types of permits mentioned in MCL 324.5505(8) and MCL 324.5506(14). Accordingly, a petition for judicial review of the issuance or denial of any of the four types of permits for an existing source that are governed by MCL 324.5505 and MCL 324.5506—one of which is a permit to install—must be filed within 90 days of the DEQ's final permit action. In this case, South Dearborn's petition for judicial review was timely filed within the 90-day window because South Dearborn filed the petition 59 days after the permit was issued.

3. The conclusion that the fourth sentence of MCL 324.5506(14) applies to any of the four permits for existing sources that are governed by MCL 324.5505 and MCL 324.5506 does not render other avenues for appeal superfluous. First, no internal conflict was created within MCL 324.5506(14). The first sentence of MCL 324.5506(14) addresses a discrete group of persons who might challenge a permit action—a person who owns or operates an existing source—and also provides them a right to contest various types of permit actions, not merely the issuance or denial of a permit. The second sentence of MCL 324.5506(14) states that owners or operators may file a petition for administrative review of the previously listed permit actions pursuant to the contested-case and judicial-review procedures of the Administrative Procedures Act. Therefore, the first two sentences of MCL 324.5506(14) exclusively concern the rights of owners and operators of an existing source to seek administrative review of specific permit actions, which is a legally distinct avenue of potential relief from judicial review. The third sentence of MCL 324.5506(14) states that any person may appeal the issuance or denial of an operating permit in accordance with MCL 600.631, which means that non-owners and non-operators also have a right to judicial review of the issuance or denial of operating permits, even if they possess no right to administrative review. Accordingly, the first three sentences of MCL 324.5506(14) each have an independent legal purpose that is unaffected by the conclusion that the fourth sentence of MCL 324.5506(14) applies to any of the four permits for existing sources that are governed by MCL 324.5505 and MCL 324.5506. Second, there was no conflict with the right to appeal the issuance or denial of a permit to install for a new source pursuant to MCL 324.5505(8). The first

two sentences of MCL 324.5505(8) govern only the appeal of permit actions for specific permits—and only when the permit is for a new source. The fourth sentence of MCL 324.5506(14) applies to judicial review of permits for an existing source, including issuance or denial of an operating permit, which is not addressed in MCL 324.5505(8). Finally, the Court of Appeals misconstrued the surplusage canon. The surplusage canon applies only when a competing interpretation gives effect to every clause and word of a statute. There was no such competing interpretation offered in this case.

Affirmed in part for different reasons; Part III(B) of the Court of Appeals opinion vacated; case remanded to the circuit court.

Justice WILDER, joined by Chief Justice MARKMAN and Justice ZAHRA, dissenting, would have affirmed the portion of the Court of Appeals opinion that held that MCL 324.5506(14) describes only two different appeals and that the term "a permit" does not refer to a third class of appellant who may appeal any type of permit. Reading MCL 324.5506(14) as a whole, sentence four's placement immediately after the sentence recognizing judicial review of an operating permit provided a highly relevant context for interpreting the statute, and therefore the more reasonable interpretation of sentence four was that "a permit" refers to the term "operating permit" used in the immediately preceding sentence, rather than to a PTI, a type of permit that is not mentioned anywhere in MCL 324.5506. The majority's interpretation renders nugatory both MCL 324.5505(8) and MCL 324.5506(14); the Legislature differentiated between new and existing sources and the identity of the challenger, and permitting any party to seek judicial review of any permit under sentence four of MCL 324.5506(14) renders these distinctions meaningless. Justice WILDER also would have reversed the holding in Part III(B) of the Court of Appeals opinion that MCR 7.119 governs, because the APA does not apply under these facts. MCL 24.291(1) states, in pertinent part, that when licensing is required to be preceded by notice and an opportunity for hearing, the provisions of the APA governing a contested case apply, and MCL 24.203(3) defines "contested case," in pertinent part, as a proceeding, including licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. Therefore, the correct interpretation of these provisions requires an evidentiary hearing before a contested case in order for the APA to apply. Because that did not happen in this case, Justice WILDER would have held that the

APA did not apply. Finally, Justice WILDER would have concluded that because the APA was not applicable, the provisions of the Revised Judicature Act, MCL 600.101 *et seq*., for judicial review applied. Therefore, MCR 7.123, the catch-all rule for appeals of agency decisions not governed by another rule, applied in this case, and MCR 7.123 provided 21 days for petitioners to challenge the DEQ's decision to issue the PTI. Because petitioners' challenge came 59 days after that decision, Justice WILDER would have held that the challenge was not timely.

ENVIRONMENT — AIR QUALITY — ADMINISTRATIVE LAW — PERMITS TO INSTALL — EXISTING SOURCES — APPEALS.

MCL 324.5505(8) and MCL 324.5506(14) of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., govern appeals from decisions of the Department of Environmental Quality to issue or deny permits; the final sentence of MCL 324.5505(8) recognizes the right to judicial review of the issuance or denial of a permit to install for an existing source in accordance with MCL 600.631 and provides that an appeal of such a permit action is governed by MCL 324.5506(14); MCL 324.5506(14) provides 90 days to seek judicial review of a decision to issue or deny a permit to install for an existing source; a petition for judicial review of the issuance or denial of any of the types of permits for an existing source that are governed by MCL 324.5505 and MCL 324.5506 must be filed within 90 days of the DEQ's final permit action.

Olson, Bzdok & Howard, PC (by *Christopher M. Bzdok* and *Tracy J. Andrews*) for South Dearborn Environmental Improvement Association, Inc.

Great Lakes Environmental Law Center (by *Nicholas Leonard* and *Oday Salim*) for Detroiters Working for Environmental Justice, Original United Citizens of Southwest Detroit, and the Sierra Club.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Neil D. Gordon*, Assistant Attorney General, for the Michigan Department of Environmental Quality and Dan Wyant.

Driggers, Schultz & Herbst, PC (by *Barbara D. Urlaub*, *William C. Schaefer*, and *Adam Hall*) for AK Steel Corporation.

BERNSTEIN, J. In this case, we consider how long an interested party has to file a petition for judicial review of a Michigan Department of Environmental Quality (DEQ) decision to issue a permit for an existing source of air pollution. We hold that MCL 324.5505(8) and MCL 324.5506(14) provide that such a petition must be filed within 90 days of the DEQ's final permit action. Therefore, the circuit court correctly denied AK Steel Corporation's (AK Steel's) motion to dismiss pursuant to MCR 2.116(C)(1) because the petition for judicial review was timely filed 59 days after the final permit action in this case. Accordingly, we affirm the judgment of the Court of Appeals in part, albeit for different reasons, and remand this case to the circuit court for further proceedings.[1]

I. FACTS AND PROCEDURAL HISTORY

AK Steel operates a steel mill within the Ford Rouge Manufacturing complex in Dearborn, Michigan. Before being acquired by AK Steel in 2014, the steel mill was operated by Severstal Dearborn, LLC (Severstal). The steel mill is subject to air pollution control and permitting requirements under the federal Clean Air Act,[2] 42

[1] Our conclusion that MCL 324.5505(8) and MCL 324.5506(14) provide 90 days to file a petition in this case makes it unnecessary to consider the applicability of the contested-case provision of the Administrative Procedures Act, MCL 24.201 *et seq*., an issue considered by the Court of Appeals. Therefore, we vacate Part III(B) of the Court of Appeals' analysis of that issue as moot.

[2] The Clean Air Act requires states to regulate air pollution emissions within their borders and abide by certain regulatory requirements in doing so. 42 USC 7407. Relevant to this appeal, states must create

USC 7401 *et seq*., and the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. In order to comply with the Clean Air Act, Part 55 of the NREPA requires the DEQ to promulgate rules to establish a permit-to-install program, MCL 324.5505(2), and an operating-permit program, MCL 324.5506(4).

In 2006, the DEQ issued Severstal a permit to install[3] titled "PTI 182-05," which authorized the rebuilding of a blast furnace and the installation of three air pollution control devices at Severstal's steel mill. In the years that followed, the permit was revised twice, first in 2006 (PTI 182-05A) and again in 2007 (PTI 182-05B). Each successive permit modified and replaced the preceding permit.

Emissions testing performed in 2008 and 2009 revealed that several emission sources at the steel mill exceeded the level permitted by PTI 182-05B. The DEQ sent Severstal a notice of violation, and after extended negotiations, they entered into an agreement, pursuant to which Severstal submitted an application for PTI 182-05C. The DEQ issued the permit on May 12, 2014, after a period of public comment and a public hearing as prescribed by the NREPA, MCL 324.5511(3). The DEQ stated that the purpose of PTI 182-05C was to correct inaccurate assumptions about

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programs requiring that certain producers of air pollution obtain permits authorizing their conduct. 42 USC 7661a.

[3] The NREPA states that "a person shall not install, construct, reconstruct, relocate, alter, or modify any process or process equipment without first obtaining from the [DEQ] a permit to install . . . authorizing the conduct or activity." MCL 324.5505(1). The DEQ defines a "permit to install" as "a permit issued by the department authorizing the construction, installation, relocation, or alteration of any process, fuel-burning, refuse-burning, or control equipment in accordance with approved plans and specifications." Mich Admin Code, R 336.1116(f).

pre-existing and projected emissions and to reallocate emissions among certain pollution sources covered by the permit to install.

On July 10, 2014, 59 days after PTI 182-05C was issued, appellee South Dearborn Environmental Improvement Association, Inc. (South Dearborn)[4] and a number of other environmental groups appealed the DEQ's decision by filing a petition for judicial review in the Wayne Circuit Court.[5]

AK Steel purchased the steel mill a short time later and filed a motion to dismiss pursuant to MCR 2.116(C)(1), arguing that South Dearborn's petition was untimely filed and thus the circuit court lacked jurisdiction over the case.[6] According to AK Steel, while MCL 324.5505(8)[7] and

[4] South Dearborn is the only named appellee that has participated in the appeal in this Court, and therefore, this opinion only addresses appellees' arguments as presented by South Dearborn.

[5] We note that South Dearborn substantively challenged the issuance of the permit to install on the grounds that the DEQ does not have statutory authority to reallocate emission limitations and levels among various sources by issuing a revised permit to install. We need not reach the merits of this argument because the sole matter before this Court is whether the petition for judicial review was timely filed.

[6] We note that AK Steel's motion was filed pursuant to the wrong court rule. Subchapter 7.100 of the court rules governs circuit court appeals from an agency's decisions. MCR 7.110 states that "[m]otion practice in a circuit court appeal is governed by MCR 2.119" and may include "special motions identified in MCR 7.211(C)." Neither Subchapter 7.100 nor MCR 2.119 provides a party with the authority to file a motion pursuant to MCR 2.116 in a circuit court appeal. Rather, because MCR 7.104(A) states that "[t]he time limit for an appeal of right is jurisdictional," AK Steel's motion to dismiss should have instead been filed pursuant to MCR 7.211(C)(2)(a), which states: "An appellee may file a motion to dismiss an appeal . . . on the ground that the appeal is not within the [circuit court's appellate] jurisdiction[.]"

[7] "Any person may appeal the issuance or denial by the department of a permit to install . . . for a new source in accordance with . . . [MCL 600.631]. Petitions for review shall be the exclusive means to obtain

MCL 324.5506(14)[8] provide a right to appeal the issuance or denial of an operating permit[9] and a permit to install for a *new* source, and state when such appeals must be filed, neither statute applies to a permit to install for an *existing* source.[10] Instead, AK Steel argued that South Dearborn's right to appeal a permit to install for an existing source is based in MCL 600.631 of the Revised Judicature Act, MCL 600.101 *et seq*., and that the period in which to file an appeal is thus governed by MCR 7.123(B)(1) and MCR 7.104(A). AK Steel claimed that South Dearborn's appeal was untimely because it was not filed within 21 days, as required by those court rules.

The circuit court disagreed. The court noted that MCL 324.5506(14) states, "A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action." Relying heavily on the Legisla-

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judicial review of such a permit and shall be filed within 90 days after the final permit action . . . . Appeals of permit actions for existing sources are subject to section 5506(14)." MCL 324.5505(8).

[8] "A person who owns or operates an existing source that is required to obtain an operating permit under this section . . . may file a petition with the department for review of [specifically listed permit actions]. This review shall be conducted pursuant to the contested case and judicial review procedures of . . . [MCL] 24.201 to [MCL] 24.328 . . . . Any person may appeal the issuance or denial of an operating permit in accordance with . . . [MCL 600.631]. A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action." MCL 324.5506(14).

[9] While an operating permit is not expressly defined, it generally allows the DEQ to engage in ongoing monitoring of emissions from a source of air pollution. If an operating permit is required for a source of emissions by the Clean Air Act, then a person may not operate that source without applying for and complying with an operating permit issued by the DEQ. See MCL 324.5506(1).

[10] The parties do not dispute that the contested permit was issued for an existing source as the term is used in the NREPA. Therefore, it is unnecessary to address any distinctions between a new and existing source.

ture's use of an indefinite article, the circuit court found that the phrase "a permit" in MCL 324.5506(14) included the permit to install appealed in this case. Therefore, South Dearborn had 90 days from the date that the fourth successive permit was issued to file a petition for judicial review. Accordingly, the circuit court held that South Dearborn's petition was timely filed and denied AK Steel's motion to dismiss.

AK Steel appealed in the Court of Appeals, which affirmed the result, but on different grounds. In the Court of Appeals' view, "[t]he circuit court erred by ignoring the plain context of [MCL 324.5506(14)] and placing far too much importance on the Legislature's use of the indefinite article 'a.' " *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 316 Mich App 265, 273; 891 NW2d 233 (2016) (*SDEIA*). Rejecting the circuit court's reasoning, the Court of Appeals held that the appeals period outlined in MCL 324.5506(14) applies only to operating permits. *Id*. at 274. The Court of Appeals determined that MCL 600.631 and MCR 7.119 governed this appeal because, in its view, the contested-case provisions of the Administrative Procedures Act, MCL 24.201 *et seq*., applied to the permitting decision pursuant to MCL 24.291(1). *Id*. at 277. On this basis, the Court of Appeals held that the petition was timely because it was filed within the 60-day period provided by MCR 7.119 and MCR 7.104(A). *Id*. at 277-278.

AK Steel sought leave to appeal in this Court. The DEQ, participating for the first time in these legal proceedings, filed a separate application raising nearly identical arguments. This Court consolidated their applications for the purpose of appellate review and scheduled oral argument on the applications. *South Dearborn Environmental Improvement Ass'n, Inc v*

Dep't of Environmental Quality, 500 Mich 966 (2017). Our order instructed the parties to address, in substantive part:

> (1) whether MCL 324.5505(8) and MCL 324.5506(14) prescribe the applicable time period for filing a petition for judicial review of the Department of Environmental Quality's issuance of the permit that the petitioners are seeking to challenge, and (2) if not, whether the issuance of that permit was a decision of that agency subject to the contested case provisions of the Administrative Procedures Act, such that the time period for filing a petition for judicial review set forth in MCR 7.119(B)(1) applies, rather than the time period established by MCR 7.123(B)(1) and MCR 7.104(A). [*Id.*]

II. STANDARD OF REVIEW

This Court reviews de novo the grant or denial of a motion to dismiss an appeal for a lack of jurisdiction.[11] Whether the circuit court has jurisdiction over this appeal is a question of statutory interpretation that we also review de novo. *People v Mazur*, 497 Mich 302, 308; 872 NW2d 201 (2015).

The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most

[11] We review a trial court's decision to grant or deny a motion for summary disposition de novo. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review questions of law de novo. As we noted earlier, AK Steel should have filed its motion pursuant to MCR 7.211(C)(2)(a). Such a motion is a motion to dismiss an *appeal*, rather than a motion for summary disposition. However, "[m]otions to dismiss or affirm or for peremptory reversal essentially are the appellate versions of a motion for summary disposition. Motions to dismiss basically present jurisdictional arguments why the court should not consider the appeal." 6 Longhofer, Michigan Court Rules Practice, Text (6th ed), § 7110.1, p 37. It follows that a motion to dismiss an appeal based on a jurisdictional argument, which presents a purely legal issue, is analogous to a motion for summary disposition and should also be reviewed de novo.

reliable evidence of that intent is the plain language of the statute. *Id*. When interpreting a statute, " 'we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.' " *People v Rea*, 500 Mich 422, 428; 902 NW2d 362 (2017), quoting *People v Miller*, 498 Mich 13, 25; 869 NW2d 204 (2015). Moreover, "[n]ontechnical words and phrases" should be construed according to their plain meaning, taking into account the context in which the words are used. *Rea*, 500 Mich at 428. "When a word or phrase is not defined by the statute in question, it is appropriate to consult dictionary definitions to determine [its] plain and ordinary meaning . . . ." *Id*.

III. INTERPRETATION AND APPLICATION OF MCL 324.5505(8) AND MCL 324.5506(14)

The focus of this appeal is on the interplay of MCL 324.5505(8) and MCL 324.5506(14). These subsections govern appeals of various DEQ permitting decisions made pursuant to Part 55 of the NREPA. The critical dispute in this case is whether the fourth sentence of MCL 324.5506(14)—"A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action"—applies to the issuance of a permit to install for an existing source. The Court of Appeals held that this sentence applies only to operating permits. *SDEIA*, 316 Mich App at 272-273. We disagree and conclude that the Court of Appeals failed to read MCL 324.5505(8) and MCL 324.5506(14) together so as to "harmonize the[ir] meaning, giving effect to the act as a whole." *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (quotation marks and citation omitted).

A. MCL 324.5505(8)

We begin our analysis with MCL 324.5505(8), which states:

> Any person may appeal the issuance or denial by the [DEQ] of a permit to install, a general permit, or a permit to operate authorized in rules promulgated under [MCL 324.5505(6)], for a *new source* in accordance with . . . MCL 600.631. . . . Petitions for review shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action, except that a petition may be filed after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review. Such a petition shall be filed no later than 90 days after the new grounds for review arise. *Appeals of permit actions for existing sources are subject to section 5506(14)*. [Emphasis added.]

The first two sentences of MCL 324.5505(8) provide that "any person" may seek judicial review in accordance with MCL 600.631[12] to challenge the issuance or denial of certain permits relating to *new* sources "within 90 days after the final permit action . . . ." However, the permit at issue in this case was issued for an *existing* source, which is addressed in the last sentence of MCL 324.5505(8)—"Appeals of permit actions for *existing* sources are subject to section 5506(14)." (Emphasis added.) The plain language of this sentence indicates that we turn to MCL 324.5506(14) for the rules govern-

[12] MCL 600.631 provides:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.

ing appeals of permit actions for an existing source, including appeals in the circuit court in accordance with MCL 600.631.

AK Steel and the DEQ argue that the last sentence of MCL 324.5505(8) does not provide a right to judicial review of permit actions for an existing source pursuant to MCL 600.631; rather, it merely notifies the reader of the contents of MCL 324.5506(14). We reject that interpretation. Reading the last sentence as a mere descriptor of the contents of MCL 324.5506(14) would strip it of any independent meaning or legal purpose. Such a reading is contrary to the interpretive principle that a statute should be construed so as to avoid rendering its language surplusage. *Rea*, 500 Mich at 428. Rather, by saying that appeals of permit actions for existing sources are "subject to" MCL 324.5506(14), the last sentence of MCL 324.5505(8) instructs the reader that a right to appeal certain permit actions for an existing source, including a right to appeal in the circuit court in accordance with MCL 600.631, exists and is subject to MCL 324.5506(14). Stated differently, such appeals are governed by MCL 324.5506(14).

This reading is consistent with our interpretation of similar statutory language in *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154; 680 NW2d 840 (2004). That case involved a utility company that wanted to build a pipeline. Two statutory provisions, MCL 247.183(1) and MCL 247.183(2), outlined the approval process for a pipeline.[13] The utility company argued that because the plain language of MCL 247.183(1) stated that it was "subject to" MCL 247.183(2), the company had to

[13] The Legislature subsequently amended MCL 247.183 by enacting 2005 PA 103.

comply only with MCL 247.183(2) and not MCL 247.183(1) as well. We rejected that argument. *Id*. at 159-160. In doing so, we examined the phrase "subject to" and noted that it is defined as "dependent upon." *Id*. at 160, citing *Random House Webster's College Dictionary* (2001). From there, we reasoned:

> When used as it is here and in other places in the Legislature's work, it is clear that the subsections work together . . . . That is, both subsections are applicable because the relevant words in subsection 1, the "subject to" words, do not mean that the requirements of subsection 1 do not apply to those utilities that are covered also by subsection 2. [*Mayor of Lansing*, 470 Mich at 160.]

We further note that *Merriam-Webster's Collegiate Dictionary* (11th ed) provides that to be "subject" to something includes, among other things, being "contingent on or under the influence of some later action <the plan is [subject] to discussion>." This signals that when an item or event is subject to another item or event, the former and the latter must be considered together. Therefore, by using the phrase "subject to" in MCL 324.5505(8), the Legislature indicated its intent that MCL 324.5505(8) and MCL 324.5506(14) be read together, not in isolation. This reading also makes sense in light of the same language used elsewhere in Part 55 of the NREPA to indicate that the application of one provision is affected by another.[14] Reading MCL 324.5505(8) as working with MCL 324.5506(14) gives

[14] See, e.g., MCL 324.5512(1) ("*Subject to section 5514*, the department shall promulgate rules for purposes of doing all of the following . . . .") (emphasis added). According to MCL 324.5514, the DEQ is prohibited from promulgating rules limiting emissions from wood heaters or enforcing federal regulations imposing such limitations. Thus, when the DEQ promulgates rules pursuant to MCL 324.5512(1), it must look to MCL 324.5514 for further restrictions on the potential subject matter of those rules.

the full text of both statutes independent meaning and avoids reducing the final sentence of MCL 324.5505(8) to a mere descriptor of the next section.

AK Steel also urges us to disregard the final sentence of MCL 324.5505(8) because it does not explicitly refer to a *permit to install*. However, when we consider the effect of the words "permit actions" in that sentence, it is clear that identifying a specific permit type in the statutory language was unnecessary. The first sentence of MCL 324.5505(8) states, "Any person may appeal *the issuance or denial* . . . of a *permit to install*, a general permit, or a permit to operate . . . for a new source in accordance with . . . MCL 600.631." (Emphasis added.) An issuance and a denial are two types of actions that the DEQ can take in response to a permit application. The last sentence of MCL 324.5505(8) then states, "Appeals of *permit actions* for existing sources are subject to section 5506(14)." (Emphasis added.) Read in context, "permit actions" refers, at a minimum, back to the two types of departmental actions mentioned in the first sentence: an issuance or a denial. It is also clear that a permit action requires a permit to act upon. In addition to a permit to install, two other types of permits are listed in the first sentence of the statute, both of which could be issued for an existing source. The general reference to "permit actions" in the final sentence of MCL 324.5505(8), rather than a reference to a specific type of permit, indicates that appeals of all three permit types are contemplated. Thus, appeals of permit actions that are subject to MCL 324.5506(14) include, at a minimum, appeals of the issuance or denial of a permit to install, a general permit, or a permit to operate for an existing source.[15]

[15] We note that it might be argued that permit actions could be read to include actions other than the issuance or denial of a permit, such as

In summary, the first part of MCL 324.5505(8) recognizes the right to judicial review of the issuance or denial of a permit to install for a *new source* in accordance with MCL 600.631 and provides "90 days after the final permit action" to file such an appeal. The final sentence of MCL 324.5505(8) recognizes the right to judicial review of the issuance or denial of a permit to install for an *existing source* in accordance with MCL 600.631 and provides that an appeal of such a permit action is governed by MCL 324.5506(14). Since this case deals with an existing source, the next step in our analysis is to examine the language of MCL 324.5506(14) to determine the time period for filing appeals related to existing sources.

B. MCL 324.5506(14)

MCL 324.5506(14) provides:

> A person who owns or operates an existing source that is required to obtain an operating permit under this section, a general permit, or a permit to operate authorized under rules promulgated under section 5505(6) may file a petition with the [DEQ] for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit. This review shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act . . . , being [MCL 24.201 to MCL 24.328]. Any person may appeal the issuance or denial of an operating permit in accordance with [MCL 600.631]. *A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action.* Such a petition may be filed after that deadline only if it is based solely on grounds arising after

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modification or revocation. As this appeal arises from the DEQ's decision to *issue* a permit to install, we need not decide whether other possible types of permit actions are also included.

> the deadline for judicial review and if the appeal does not involve applicable standards and requirements of the acid rain program under title IV. Such a petition shall be filed within 90 days after the new grounds for review arise. [Emphasis added.]

The Court of Appeals held that the 90-day period in which to file a petition for judicial review of "a permit" in MCL 324.5506(14) applies only to appeals of operating permits. *SDEIA*, 316 Mich App at 274. We disagree and hold that MCL 324.5506(14) also provides 90 days to seek judicial review of a decision to issue or deny a permit to install for an existing source.

The fourth sentence of MCL 324.5506(14) has been the focus of the disagreement in this case. It states that "[a] petition for judicial review is the exclusive means of obtaining judicial review of *a permit* and shall be filed within 90 days after the final permit action." MCL 324.5506(14) (emphasis added). Appellants and the dissent argue that "a permit" should be read as referring to only the operating permits described in the previous sentence—"[a]ny person may appeal the issuance or denial of an operating permit in accordance with [MCL 600.631]." If we read MCL 324.5506(14) alone and without consideration of MCL 324.5505(8), we might be inclined to agree.[16] However, we do not

[16] We agree with the dissent that the placement of the fourth sentence in MCL 324.5506(14) within that provision is a relevant consideration; however, it is not dispositive. As our opinion explains, when MCL 324.5505(8) and MCL 324.5506(14) are read together, the plain language of the statutes demonstrates that "a permit" should not be read as referring to only "an operating permit" as described in the preceding sentence. Our interpretation is consistent with the whole-text canon, "which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167. Reviewing the entire text requires consideration of the relationship of text within a single statu-

read statutory language in isolation and must construe its meaning in light of the context of its use. See *Rea*, 500 Mich at 430; *Guardian Alarm Co*, 468 Mich at 421. As explained earlier, the cross-reference in MCL 324.5505(8) to MCL 324.5506(14) demonstrates that appeals of the issuance or denial of a permit are subject to MCL 324.5506(14) when the permit is for an existing source. With this in mind, we conclude that a petition for judicial review of the issuance or denial of *any* of the types of permits for an *existing source* that are governed by MCL 324.5505 and MCL 324.5506 must be filed within 90 days of the DEQ's final permit action.

Several considerations lead us to this conclusion. The first is the presence of an indefinite article preceding the word "permit" in MCL 324.5506(14), which the Court of Appeals did not give due consideration. Rather than stating that a petition for review of *the* permit must be filed within 90 days, the statute states that a petition for review of "*a* permit" must be filed within 90 days. MCL 324.5506(14) (emphasis added). This suggests that the statute refers to more than one type of permit. "A" is an indefinite article, which is often used to mean "any."[17] *Merriam-Webster's Collegiate Dictionary* (11th ed). Whether "a" should be read as referring to a discrete item or as referring to one of many potential items depends on the context in which it is used.[18] But, while the article may be susceptible to

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tory provision as well as its relationship to the text of other provisions within the same act. See *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003).

[17] "Any" means "one, some, or all indiscriminately of whatever quantity[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed).

[18] See *Allstate Ins Co v Freeman*, 432 Mich 656, 743-744; 443 NW2d 734 (1989) (CAVANAGH, J., concurring in part and dissenting in part) (opining that whether the article "a" should be read as referring to one or many is dependent on the context of its usage). We have also

multiple meanings when read in isolation, we must select the meaning that makes the most sense when the statute is read as a whole. See *Rea*, 500 Mich at 431; *Miller*, 498 Mich at 24.[19]

It is also a fundamental principle of statutory construction that "[w]hen the Legislature uses different words, the words are generally intended to connote different meanings." *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009). Applying that principle here, had the Legislature intended the fourth sentence of MCL 324.5506(14) to refer only to operating permits, then it would have used that specific term, or another restrictive term, rather than the general phrase "a permit." Four permit types[20] are mentioned

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repeatedly recognized the significance of using a definite article to indicate the inverse—that a word should be read restrictively. See, e.g., *Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000) (noting that when the Legislature has qualified the same word with the definite article "the" and the indefinite article "a" in the same part of a statute, the Court should not read "the" as if it were "a").

[19] The dissent does not disagree with our conclusion that the meaning of the indefinite article "a" must be determined from its context, but the dissent instead suggests that "a permit" should be read as recognizing that there may be multiple "permits of the singular species identified in the preceding sentence . . . ." It is true that "a" can refer to a plural or singular antecedent depending on the context of its use, but that does not affect our analysis. The fact that a single facility may have more than one operating permit or that one might seek judicial review of more than one permit simultaneously does not answer the question of whether the sentence describing the timing for judicial review of "a permit" refers to permits other than an operating permit. Rather, when viewing the term in context, "a permit" is more reasonably read as referring to operating permits as well as those other permits for an existing source that are referred over to MCL 324.5506(14) by the last sentence of MCL 324.5505(8).

[20] The named permits are operating permits, permits to install, general permits, and permits to operate authorized under rules promulgated pursuant to MCL 324.5505(6). Currently, no administrative rules

by name in MCL 324.5505(8) and MCL 324.5506(14), which indicates that the Legislature knew how to be specific when it so intended. It is notable that the Legislature refers to the generic "a permit" in the sentence stating the time line for filing for judicial review but specifically refers to operating permits in the immediately preceding sentence; had the Legislature intended the 90-day time line to apply only to operating permits, it could have easily done so, but it did not. Because the statute refers instead to "a permit," this language thus refers to any of the four types of permits mentioned in MCL 324.5505(8) and MCL 324.5506(14). This reading is bolstered by other provisions in Part 55 of the NREPA, in which the Legislature used the phrase "a permit" to refer to all permits governed by Part 55[21] and named specific permits when a provision's applicability is limited to a single type of permit.[22]

We also find significant the Legislature's use of restrictive language in other parts of the very statutes being analyzed. As South Dearborn notes, when the Legislature wanted to use "permit" to refer to a particular previously referenced permit, it used more restrictive language. In MCL 324.5506(14), the first sentence lists three types of permits that an owner or

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exist that govern a permit-to-operate program, but such permits remain legally distinct from operating permits.

[21] See, e.g., MCL 324.5515(1) ("If the department believes that a person is violating . . . a permit issued under this part, . . . the department shall make a prompt investigation."); MCL 324.5510 ("In accordance with this part and rules promulgated under this part, the department may, after notice and opportunity for public hearing, deny or revoke a permit issued under this part if any of the following circumstances exist[.]").

[22] See MCL 324.5502(1) ("Except as provided in subsection (2), the department shall not issue a permit to install or an operating permit to a municipal solid waste incinerator unless . . . .").

operator of an emission source might possess and instructs how "*such a permit*" and "*his or her permit*" may be reviewed when referring back to those specific permits. (Emphasis added.) This signals a limitation to the previously mentioned permits. The final three sentences of MCL 324.5506(14) also distinguish between restrictive and nonrestrictive language. They state:

> *A petition for judicial review* is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action. *Such a petition* may be filed after that deadline only if it is based solely on grounds arising after the deadline for judicial review and if [it does not involve Title IV's acid rain program]. *Such a petition* shall be filed within 90 days after the new grounds for review arise. [MCL 324.5506(14) (emphasis added).]

The final two sentences in the quoted passage refer back to the subject of the preceding sentence by starting with the words "such a petition." By doing so, these sentences impose additional limitations on the petition for judicial review described in the first sentence. The use of "such a petition" also makes clear that these limitations apply only to a petition for judicial review, as opposed to a petition for administrative review mentioned earlier in the statute. Similarly, although MCL 324.5505(8) uses the phrase "such a permit," MCL 324.5506(14) does *not* use that same phrase to limit the types of permit to which the 90-day time line applies.

On the basis of this analysis, we conclude that the Legislature intended "a permit" in MCL 324.5506(14) to mean "any permit" in order to describe the requirements for judicial review of the issuance or denial of the four types of permits for existing sources that are governed by MCL 324.5505 and MCL 324.5506, one of

which is a permit to install. Accordingly, a petition for judicial review of a permit to install for an existing source must be filed within 90 days of the permit being issued. Such a reading harmonizes the meaning of these two statutes.

The dissent argues that MCL 324.5506(14) is silent as to petitions for judicial review of permits to install for existing sources and that this silence indicates that the 90-day period contained in MCL 324.5506(14) does not apply to such petitions. However, as already discussed, MCL 324.5505(8) clearly states that "[a]ppeals of permit actions for *existing* sources are subject to section 5506(14)." (Emphasis added.) This effectively refers judicial review of permit actions for existing sources to MCL 324.5506(14); it would be unnecessary to state again in MCL 324.5506(14) that a right to judicial review exists with regard to permits to install for existing sources. Accordingly, the silence in MCL 324.5506(14) as to the availability of judicial review for permits to install for existing sources is immaterial because this right is recognized in MCL 324.5505(8), which explicitly states that such appeals are "subject to" MCL 324.5506(14).

The Court of Appeals and the dissent suggest that the interpretation we adopt today would render "other avenues for appeal" superfluous because the fourth sentence of MCL 324.5506(14) "would apply to the appeal of any and all permits." *SDEIA*, 316 Mich App at 273. However, this concern is unfounded. First, no internal conflict is created within MCL 324.5506(14). The first sentence addresses a discrete group of persons who might challenge a permit action—"[a] person who owns or operates an existing source"—and also provides them a right to contest various types of permit actions —not merely the issuance or denial of a permit. MCL 324.5506(14). The second sentence of MCL 324.5506(14)

states that owners or operators may file a petition for administrative review of the previously listed permit actions pursuant to the contested-case and judicial-review procedures of the Administrative Procedures Act. The first two sentences of MCL 324.5506(14) thus exclusively concern the rights of owners and operators of an existing source to seek *administrative review* of specific permit actions. Administrative review is a legally distinct avenue of potential relief from judicial review. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 698; 614 NW2d 607 (2000) (describing the distinctions between judicial and administrative review). The third sentence of MCL 324.5506(14) states that "[a]ny person may appeal the issuance or denial of an operating permit in accordance with" MCL 600.631. This clearly means that non-owners and non-operators also have a right to judicial review of the issuance or denial of operating permits, even if they possess no right to administrative review. Thus, the first three sentences of MCL 324.5506(14) each have an independent legal purpose that is unaffected by our construction of the fourth sentence.

Second, there is no conflict with the right to appeal the issuance or denial of a permit to install for a new source pursuant to MCL 324.5505(8). As we have explained, the first two sentences of MCL 324.5505(8) govern only the appeal of permit actions for specific permits—and only when the permit is for a new source. The fourth sentence of MCL 324.5506(14) applies to judicial review of permits for an existing source, including issuance or denial of an operating permit, which is not addressed in MCL 324.5505(8).[23]

[23] Even assuming that a conflict existed between the first part of MCL 324.5505(8) and the fourth sentence of MCL 324.5506(14), the more specific language concerning new sources in the former would control over the more general language in the latter. See *People v Calloway*, 500 Mich 180, 185-186; 895 NW2d 165 (2017).

Third, the Court of Appeals also misconstrued the surplusage canon. That canon applies only when a "competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp v i4i Ltd Partnership*, 564 US 91, 106; 131 S Ct 2238; 180 L Ed 2d 131 (2011) (quotation marks and citation omitted). There is no such competing interpretation offered here. In this case, it is the Court of Appeals' interpretation of MCL 324.5506(14) that would render the last sentence in MCL 324.5505(8) needless surplusage. As we explained, its interpretation would relegate the last sentence of MCL 324.5505(8) to a mere descriptor without any independent legal meaning. Therefore, the surplusage canon compels us to reject that interpretation. See *Rea*, 500 Mich at 433.

For the aforementioned reasons, MCL 324.5505(8) and MCL 324.5506(14) provide 90 days after the final permit action to file a petition for judicial review. South Dearborn's petition for judicial review was timely filed within the 90-day period.

IV. CONCLUSION

We hold that, pursuant to MCL 324.5505(8) and MCL 324.5506(14), South Dearborn had 90 days from the date the DEQ issued PTI 182-05C to file a petition for judicial review of that decision in the circuit court. Because South Dearborn's petition for judicial review was timely filed 59 days after the permit was issued, the circuit court properly denied AK Steel's motion to dismiss. Accordingly, we affirm the judgment of the Court of Appeals in part for different reasons, vacate Part III(B) of the Court of Appeals' opinion, and remand this case to the circuit court for further proceedings.

MCCORMACK, VIVIANO, and CLEMENT, JJ., concurred with BERNSTEIN, J.

WILDER, J. (*dissenting*). I respectfully dissent because I would affirm the portion of the Court of Appeals opinion that holds that MCL 324.5506(14) describes only two different appeals and that the term "a permit" does not refer to a third class of appellant who may appeal *any* type of permit. Additionally, I would reverse the Court of Appeals insofar as it held that MCR 7.119 governs and hold that the Administrative Procedures Act (APA), MCL 24.201 *et seq*., does not apply under these facts.

I. ANALYSIS

At issue in this case is whether petitioners timely filed their claim in circuit court seeking judicial review of a permitting decision by the Michigan Department of Environmental Quality (MDEQ) regarding a permit to install for an existing source of air pollution. In short, this Court held oral argument on the questions (1) whether MCL 324.5506(14) gave petitioners a 90-day period to bring their claim and (2) if not, whether MCR 7.119 gave petitioners a 60-day period to bring their claim. *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 500 Mich 966 (2017). If neither provision applies, petitioners' claim is time-barred because it was not brought within the 21 days provided by the catch-all provision of MCL 600.631.

A. INTERPRETATION OF PART 55

The dispositive issue is whether the MDEQ's issuance of an existing permit to install is governed by Part 55 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. MCL 324.5506(14) must be interpreted harmoniously with MCL 324.5505(8), and both provisions must be

interpreted while keeping in mind their place in the overall licensing scheme, which comprises state and federal laws and regulations. "A court does not construe the meaning of statutory terms in a vacuum. Rather, we interpret the words in their context and with a view to their place in the overall statutory scheme." *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008) (quotation marks and citations omitted). When interpreting words and phrases used in a statute, those " 'words and phrases used . . . must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense.' " *Sweatt v Dep't of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003) (opinion by MARKMAN, J.), quoting *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

Air pollution regulation is governed by interrelated federal and state legislative schemes that are implemented by executive agencies. Federal air pollution regulation is rooted in the Clean Air Act (CAA), 42 USC 7401 *et seq*., the central goal of which is to ensure clean air by establishing national air quality standards and requiring states to develop state plans to ensure that those standards are met. The Environmental Protection Agency (EPA) is the federal agency responsible for implementing the CAA by setting air quality standards and approving state plans. *Id*. However, the CAA establishes only the minimum air quality levels, and states are free to adopt more stringent environmental standards. 42 USC 7416; *Her Majesty the Queen in right of the Province of Ontario v Detroit*, 874 F2d 332, 336 (CA 6, 1989).

Michigan's air pollution control program is rooted in Part 55 of the NREPA and is implemented by the MDEQ, the permitting authority responsible for developing and implementing air quality requirements and enforcing compliance with both state and federal air quality requirements. There are two types of air permits in Michigan:[1] a permit to install (PTI) provided under Michigan law pursuant to § 5505 of Part 55 and a renewable operating permit (ROP) required under federal law by Title V of the CAA, which was incorporated into §§ 5506 and 5507 of Part 55.

PTIs are required for any new process or process equipment for a new source of pollution and for modifications to any existing source that might result in a change of emissions. MCL 324.5505. Not all sources of air contaminants require a PTI, and certain insignificant sources are exempt from the PTI requirement altogether. Mich Admin Code, R 336.1201. A PTI is a requirement solely based in Michigan law; there is no federal requirement that a source obtain a PTI. The ROP program, on the other hand, is part of a national permitting system administered by the state, which

[1] Mich Admin Code, R 336.1201 and R 336.1210. Part 55 also permits the MDEQ to create a nonrenewable permit to operate "for sources, processes, or process equipment that are not subject to the requirement to obtain a renewable operating permit," but the MDEQ does not currently issue any such nonrenewable operating permits. MCL 324.5505(6). In the past, the issuance of a permit to install was followed by the application for and issuance of a permit to operate. The need for a permit to operate for sources has been eliminated. Mich Admin Code, R 336.1116 (g) ("The requirement to obtain a permit to operate was removed from these rules effective July 26, 1995. Permits to operate issued before that date remain in effect and legally enforceable unless they are voided pursuant to R 336.1201(6)."). Additionally, MCL 324.5542(1) permits municipalities to establish their own air quality standards and regulations so long as they are at least as stringent as state regulations and federal standards.

requires permitting for "major" sources of air pollution as described in Title V of the CAA. MCL 324.5506; 42 USC 7661.

PTI terms and conditions may be incorporated into an ROP, but if a source does not need an ROP, then a PTI is the primary permit. Mich Admin Code, R 336.1201(6)(b) and R 336.1214. Additionally, PTIs may incorporate legally enforceable provisions restricting potential emissions, which allows a source to avoid classification as "major"; as a result, a company can "opt out" of the ROP requirement. Mich Admin Code, R 336.1205. Because many facilities have hundreds or thousands of processes or devices, and many of those may be subject to multiple regulatory programs including the PTI and ROP programs, it is not uncommon for an owner to apply for and receive multiple PTIs and/or ROPs for a single facility.[2]

Additionally, these air pollution permitting schemes treat new sources of air pollution differently from existing sources. For example, the CAA requires new stationary sources "to be built with [the] best technology, and allows less stringent standards for existing sources."[3] The rationale is founded in simple economics: "[t]he cost of retrofitting existing . . . factories to emit less pollution is generally higher than the marginal cost of building new sources with cleaner characteristics."[4] Additionally, there are sound public-policy

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[2] See MDEQ, *Permit to Install Workbook: A Practical Guide to Completing an Air Permit Application* (revised January 2016), pp 3-2, 4-1, 4-7, available at <https://perma.cc/R8K8-73B7>.

[3] EPA, *The Clean Air Act in a Nutshell: How It Works* (March 22, 2013), p 1, available at <https://perma.cc/NZ2S-PWLU>; see also 42 USC 7411 (establishing pollution control standards applicable to new stationary and mobile sources).

[4] Levinson, *Grandfather Regulations, New Source Bias, and State Air Toxics Regulations*, 28 Ecological Econ 299, 300 (1999) (citation omit-

reasons for this disparate treatment, namely, "fairness to owners of existing sources in the face of changing social norms, scientific understanding of pollution, and government standards."[5]

Having examined the statutory licensing scheme, two conclusions seem apparent: (1) not all permits are created equally, and (2) not all sources of air pollution are treated equally. Nothing in the statutory licensing scheme indicates that all permits and all sources of air pollution should share parity when it comes to judicial review of permitting decisions.

Rather, judicial review for Title V ROP permitting decisions is mandated under federal law, which allows any person who participated in the public comment period to sue the local permitting agency (here, the MDEQ) in state court no later than 90 days after the final action on the permit. See 40 CFR 70.4(b)(3) (2017). By contrast, federal law does not require the issuance of a PTI and consequently does not mandate judicial review of the issuance of such a permit. Rather than shortening the period for any person to bring the challenge to ROP permitting decisions mandated under federal law, the Legislature chose to maintain the full 90-day ceiling imposed by Title V. MCL 324.5506(14) (stating, in pertinent part, that "[a] petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action"). There is no dispute that this 90-day provision includes ROPs. The question is whether it *only* includes ROPs, for

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ted); see also HR Rep No 95-294, at 185 (1977), as reprinted in 1977 USCCAN 1077, 1264 (indicating that pollution control equipment was not required of older sources because of the expense of retrofitting existing sources and the perceived economic unfairness resulting from a retrofit requirement).

[5] *Grandfather Regulations*, 28 Ecological Econ at 300.

which judicial review is mandated by federal law, or whether it also applies to PTIs, which are solely a creation of Michigan law. The majority concludes that "a permit" is expansive enough to include PTIs. However, in light of the statutory scheme, the textual clues point in the opposite direction.

It is undisputed that § 5505(8) applies *only* to new sources and that according to the final sentence of § 5505(8), existing sources are governed by § 5506(14). Subsection (14) recognizes two categories of challenges to permitting decisions. The first category is the "owner or operator" challenges that take place according to the contested-case and judicial-review procedures of the APA, which are limited to "an operating permit under this section [an ROP], a general permit, or a permit to operate [a nonrenewable operating permit]." MCL 324.5506(14). Accordingly, owners and operators cannot challenge a PTI decision under this provision. The second category of challenges are those brought by "[a]ny person" to challenge the issuance of an operating permit (an ROP); in accordance with Title V, a petition must be filed no more than 90 days after the final action on the permit.[6] The fourth, fifth, and

[6] At oral argument, the MDEQ's counsel acknowledged that petitioners have alleged that their members, who live near the steel mill at issue, have suffered particularized injuries as a result of the MDEQ's decision to issue the PTI. See *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 296; 737 NW2d 447 (2007) ("A nonprofit organization has standing to bring suit in the interest of its members if its members would have standing as individual plaintiffs."), overruled on other grounds by *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349 (2010). Specifically, the MDEQ agrees that petitioners have alleged that their members have been injured by an increase in air pollutants that resulted from the MDEQ's decision to issue the permit. Accordingly, because petitioners have made general factual allegations that injury will result from the MDEQ's conduct, and because this case is still in the pleading phase, this allegation is sufficient to demonstrate standing.

sixth sentences of § 5506(14) describe the timing and conditions for bringing a petition described in the third sentence.

Nothing in § 5506(14) refers to the authority of "any person" to challenge an existing-source PTI decision under MCL 600.631. Rather, the fourth sentence of § 5506(14) states that "[a] petition for judicial review is the exclusive means of obtaining judicial review of *a permit* and shall be filed within 90 days after the final permit action." (Emphasis added.) The term "a permit" either means "any permit listed under § 5505(8)" as the majority holds, or it refers to the "operating permit" mentioned in the immediately preceding sentence. Reading § 5506(14) as a whole, sentence four's placement immediately after the sentence recognizing judicial review of an operating permit is a highly relevant context for interpreting the statute. "Statutory interpretation requires courts to consider the *placement* of the critical language in the statutory scheme." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). I believe the more reasonable interpretation of sentence four under § 5506(14) is that "a permit" refers to the term "operating permit" used in the *immediately preceding sentence*, rather than to a PTI, a type of permit that is not mentioned *anywhere* in § 5506.

The majority emphasizes the Legislature's use of an indefinite article as textual support for its interpretation. It is true that "a" may *sometimes* substitute for the term "any." See *Allstate Ins Co v Freeman*, 432 Mich 656, 699; 443 NW2d 734 (1989) (opinion by RILEY, C.J.) (finding that "an insured" unambiguously means "any insured"). However, this Court has also recognized that the use of an indefinite article does not *always* require a binary reading in which "a" refers to

"any and all" and "the" refers to "one and only one specific antecedent noun." Rather than being purely a measure of particularity, indefinite nouns may indicate singularity and plurality. *Robinson v Lansing*, 486 Mich 1, 26-27; 782 NW2d 171 (2010) (YOUNG, J., concurring) (noting that a definite article may refer to an earlier noun modified by an indefinite article). See also *Michigan v McQueen*, 493 Mich 135, 154-156; 828 NW2d 644 (2013) (concluding that the definite article "the" in "the qualifying patient" used later in the statute at issue must refer back to the antecedent indefinite article "a" in "a qualifying patient" used in the introductory part of that statute). This case presents an instance in which "a permit" does not refer to "any and all permits." Instead, it recognizes that there may be plural permits of the singular species identified in the preceding sentence (operating permit).

The majority reasons that the meaning of "a permit" must lie in § 5505(8) because the cross-reference to § 5506(14) would otherwise be rendered meaningless—or at least would have little meaning—contrary to the canon against surplusage. However, appeals for existing sources are still subject to § 5506(14), and the cross-reference forecloses any argument that an appeal related to a PTI for an existing source might be made under § 5505(8) because the modifier of "new source" would only apply to the immediately preceding noun "permit to operate" (nonrenewable permit). Moreover, as the majority also notes, that canon applies only when a "competing interpretation gives effect to *every* clause and word of a statute," *Microsoft Corp v i4i Ltd Partnership*, 564 US 91, 106; 131 S Ct 2238; 180 L Ed 2d 131 (2011), and the maxims of interpretation are merely *guides* to discovering the Legislature's bona fide intent, not hard and fast rules. (Citation and quotation marks omitted;

emphasis added.) The majority's interpretation renders nugatory both §§ 5505(8) and 5506(14). The Legislature differentiated between new and existing sources and the identity of the challenger. Permitting *any* party to seek judicial review of *any* permit under sentence four of § 5506(14) renders these distinctions meaningless. Thus, it seems more reasonable to read the cross-reference as clarification that § 5505(8) is focused upon new sources, while § 5506(14) is focused upon existing sources.

The Legislature's use of the phrase "subject to" in the final sentence of § 5505(8)—"[a]ppeals of permit actions for existing sources are *subject to* section 5506(14)"—does not alter my conclusion. (Emphasis added.) Two statutory sections that refer to the same issue and are connected by the phrase "subject to" often work together such that both sections govern that particular issue. See *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154, 158-161; 680 NW2d 840 (2004). In this case, however, the "subject to" language applies only to "[a]ppeals of permit actions for *existing sources*," while the first sentence of § 5505(8) only recognizes judicial review of a permit to install for *new sources*. (Emphasis added.) In other words, because nothing in § 5505(8) before the final sentence refers to existing sources, the "subject to" language does not apply beyond that final sentence and nothing in that sentence indicates which *types* of permits for existing sources are "subject to" § 5506(14).

The majority further reasons that the Legislature's failure to use the term "such a permit" in § 5506(14) as it did in § 5505(8) must be given meaning, because surely the Legislature knows how to properly use a definite article. Yet, this reasoning runs both ways. The Legislature surely knows how to include the term

"permit to install" when it wants to refer to one's right to challenge a decision on a PTI under MCL 600.631—precisely as indicated in § 5505(8) where the Legislature recognized this right regarding new sources.

Additionally, the fourth sentence of § 5506(14) does not describe what judicial review process is applicable. Presumably, this would be the judicial review process described in the previous sentence (MCL 600.631), but the majority's interpretation would sever the fourth sentence from the third—an approach that violates the interpretive canon that a statutory text must be construed as a whole. *Sweatt*, 468 Mich at 179 (opinion by MARKMAN, J.); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167 ("Perhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."). Rather than read the sentences of § 5506(14) in isolation from each other and from the rest of the statutory scheme, I conclude that the more reasonable interpretation is that "a permit" refers to "an operating permit."

Moreover, there is no reason to assume that the Legislature inadvertently left out judicial review for existing permits to install under the NREPA. "Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). This Court has recognized that "courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Id*. (quo-

tation marks, citations, and brackets omitted). Notably, that is *precisely* what the majority does: it takes language from § 5505(8), a provision that recognized a right for any person to challenge a PTI for a new source under MCL 600.631, and reads it into § 5506(14), thereby judicially creating what the Legislature plainly omitted—a 90-day window for any person to challenge a PTI for an existing source. This results in a forced parity on all permits for all sources of air pollution—a parity that is not supported by the statutory licensing scheme, which unquestionably treats different permits and different sources of air pollution *differently*.

Because I conclude that the textual clues of the statute point in another direction, I would affirm the portion of the Court of Appeals opinion that holds that MCL 324.5506(14) describes only two different appeals and that the term "a permit" does not refer to a third class of appellant who may appeal any type of permit.

B. INTERPRETATION OF MCL 24.201

The majority concludes that the instant petition was timely filed, and accordingly, it does not reach the issue of whether the Court of Appeals properly considered the applicability of the contested-case provision of the APA. However, because I conclude that MCL 324.5505(8) and MCL 324.5506(14) do not extend to give petitioners 90 days to bring their petition, my analysis continues. I would reverse the portion of the Court of Appeals opinion holding that MCR 7.119 governs, because the APA does not apply under these facts.

MCR 7.119 applies to appeals governed by the APA. MCR 7.119(B)(1) provides, in pertinent part, that "[j]udicial review of a final decision or order shall be by filing a claim of appeal in the circuit court within 60

days after the date of mailing of the notice of the agency's final decision or order." The facts demonstrate that petitioners' challenge came 59 days after the MDEQ decision. Thus, if the APA applies, then petitioners' challenge was timely under MCR 7.119.

In holding that the APA applies, the panel relied on a relevant provision of Chapter 5, MCL 24.291(1), which states, in pertinent part, that "[w]hen licensing is required to be preceded by notice *and an opportunity for hearing*, the provisions of this act governing a contested case apply." (Emphasis added.) Section 91(1) does not express what *type* of "hearing" is required. However, Chapter 1 of the APA defines "contested case," in pertinent part, as

> a proceeding, including . . . licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an *evidentiary* hearing. [MCL 24.203(3) (emphasis added).]

The panel erroneously concluded without explanation that an "opportunity for hearing" includes a public hearing.[7] As previously stated, each word and phrase in a statute "must be assigned such meanings as are in harmony with the whole of the statute . . . ." *Sweatt*, 468 Mich at 179 (opinion by MARKMAN, J.). Thus, the APA's Chapter 5 requirement for a "hearing" must be read in harmony with its Chapter 1 requirement that the hearing be "evidentiary." Therefore, the correct interpretation of these provisions requires an *eviden-*

[7] *South Dearborn Environmental Improvement Ass'n v Dep't of Environmental Quality*, 316 Mich App 265, 277 n 3; 891 NW2d 233 (2016) ("[N]otice was provided of the public comment period, which was held from February 12, 2014, through March 19, 2014, and of the public hearing, which was held on March 19, 2014.").

tiary hearing prior to a contested case in order for the APA to apply. Because that did not happen in this case, the APA does not apply.

Petitioners argue that the informal proceedings that occurred in this case were sufficient for the APA to apply. Indeed, MCL 24.292 describes instances in which informal proceedings may be used when an agency seeks to suspend, revoke, or amend a license:

> Before beginning proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license, an agency shall give notice, personally or by mail, to the licensee of facts or conduct that warrants the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license . . . . [MCL 24.292(1).]

However, MCL 24.292 anticipates that a contested case could be brought in the eventuality that informal proceedings do not yield a desired outcome. Therefore, the final agency decision as described in MCR 7.119 would not occur absent the contested case being brought, and although MCR 7.119 is applicable to contested cases, it does not apply to the informal proceedings at issue here. Because I conclude that MCR 7.119 does not apply here, I would reverse the portion of the Court of Appeals decision that holds otherwise.

C. APPLICATION OF MCL 600.631

Because the APA is not applicable, this Court must look to the Revised Judicature Act (RJA), MCL 600.101 *et seq*., for judicial review. MCL 600.631 provides, in pertinent part:

> An appeal shall lie from any order, decision, or opinion of any state . . . agency, authorized under the laws of this state to promulgate rules from which an appeal or other

> judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. *Such appeals shall be made in accordance with the rules of the supreme court*. [Emphasis added.]

The RJA provides for judicial review when a statute authorizing the agency to act fails to provide for judicial review and the agency decision does not fall within the APA's definition of a "contested case." Because I conclude that the NREPA does not provide judicial review for petitioners' challenge to the PTI, and because I conclude that the APA does not apply in this case, I also conclude that no appellate review has "otherwise been provided for by law."

MCR 7.123 is the catch-all rule for appeals of agency decisions not governed by another rule. The time requirement under MCR 7.123(B)(1) refers to MCR 7.104(A), which provides, in pertinent part, that "[a]n appeal of right to the circuit court must be taken within . . . 21 days . . . ." Petitioners' challenge came 59 days after the MDEQ decision. Thus, petitioners' challenge to the MDEQ issuance of the PTI was not timely.

II. CONCLUSION

I would affirm the portion of the Court of Appeals opinion that holds that MCL 324.5506(14) describes only two different appeals and that the term "a permit" does not refer to a third class of appellant who may appeal any type of permit. I would reverse the holding that MCR 7.119 governs, because the APA does not apply under these facts. Instead, I would conclude that MCR 7.123 provided 21 days for petitioners to challenge the MDEQ's decision to issue the PTI and that

because petitioners' challenge came 59 days after that decision, the challenge was not timely. Accordingly, I respectfully dissent.

MARKMAN, C.J., and ZAHRA, J., concurred with WILDER, J.

BAZZI v SENTINEL INSURANCE COMPANY

Docket No. 154442. Argued January 11, 2018 (Calendar No. 1). Decided July 18, 2018.

Ali Bazzi brought an action in the Wayne Circuit Court against Sentinel Insurance Company and Citizens Insurance Company, seeking to recover personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., for injuries he received while driving a vehicle leased by his mother, Hala Bazzi. Genex Physical Therapy, Inc., Elite Chiropractic Center, PC, and Transmedic, LLC, intervened in the action to recover payment for the medical services they individually provided to plaintiff for his injuries. Although Hala leased the vehicle in her own name, Sentinel Insurance insured the vehicle through a commercial policy issued to Mimo Investment, LLC, whose resident agent was plaintiff's sister, Mariam Bazzi. Sentinel Insurance filed a third-party complaint against Hala and Mariam, seeking to rescind the policy on the basis that Hala and Mariam had procured the policy through fraud. The court, Lita M. Popke, J., entered a default judgment against Hala and Mariam rescinding the policy. Sentinel Insurance then moved for summary disposition of plaintiff's PIP benefits claim and the claims of the intervening medical providers, arguing that the policy was void *ab initio* because it had been rescinded for fraud, which precluded recovery under the policy. The court denied Sentinel Insurance's motion, concluding that plaintiff had a valid claim for PIP benefits under the innocent-third-party rule, which provides that an insurer may not rescind benefits for mandatory coverage under an insurance policy as to an innocent third party injured in an accident, even though the insured procured the policy through material misrepresentations in the application. Plaintiff appealed by leave granted. In a split decision, the Court of Appeals, SAWYER, P.J., and BOONSTRA, J. (BECKERING, J., dissenting), reversed the trial court and remanded for further proceedings. 315 Mich 763 (2016). The majority reasoned that the innocent-third-party rule did not survive the decision in *Titan Ins Co v Hyten*, 491 Mich 547 (2012)—which abrogated the judicially created easily-ascertainable-fraud rule—because there was no meaningful distinction between the two rules and because no statute prohibits

an insurer from raising a fraud defense with respect to PIP benefits. The Supreme Court granted the application for leave to appeal filed by plaintiff and intervening plaintiffs Genex Physical Therapy and Elite Chiropractic Center. 500 Mich 990 (2017).

In an opinion by Justice WILDER, joined by Chief Justice MARKMAN and Justices ZAHRA, BERNSTEIN, and CLEMENT, the Supreme Court *held*:

The Court's decision in *Titan* implicitly abrogated the innocent-third-party rule. An insurer may seek rescission of an automobile insurance policy on the basis of the common-law defense of fraud—even with regard to a third party seeking to recover statutorily mandated PIP benefits—because the no-fault act does not limit an insurer's ability to rescind a policy on that basis. However, an insurer is not entitled to automatic rescission of a policy with regard to a third party even though the policy was procured by the insured through fraud. Instead, a trial court must balance the equities between the insurance company and the third party to determine whether, in its discretion, the policy could be rescinded as between those parties. In this case, Sentinel Insurance could raise the defense of fraud to plaintiff's action for PIP benefits. The Court of Appeals erred when it concluded that Sentinel Insurance was automatically entitled to rescission of the contract with regard to plaintiff. The case was remanded to the trial court for it to balance the equities between the two parties to determine whether, in its discretion, the policy could be rescinded.

1. Automobile insurance contracts are governed by a combination of statutes and the common law related to contracts. Under MCL 500.3112, PIP benefits are payable to or for the benefit of an injured person or, in the case of an individual's death, to or for the benefit of the individual's dependents. Because PIP benefits are mandated by MCL 500.3101(1) of the no-fault act, issues regarding the award of those benefits are decided by construing the statute and the policy together as though the statute is part of the policy, and the rights and limitations of the policy coverage are governed by the statute. Conversely, the rights and limitations of a policy are entirely contractual and construed without reference to the statute if there is no applicable statute. Article 3, § 7 of the 1963 Michigan Constitution provides that common-law defenses remain in effect until they expire by their own limitations or are changed, amended, or repealed. Consequently, unless doing so is clearly prohibited by a statute, an insurer may continue to avail itself of any common-law defenses, including fraud in the procurement of the policy. The

plain language of the no-fault act does not preclude or otherwise limit an insurer's ability to rescind a policy on the basis of the common-law defense of fraud, including as to a third party. Accordingly, Sentinel Insurance could raise the defense of fraud and seek rescission of the insurance policy as to plaintiff.

2. *Titan* abrogated the easily-ascertainable-fraud rule—which provided that insurance companies may not rescind a policy on the basis of fraud when the fraud was easily ascertainable—and overruled prior Court of Appeals decisions, including *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568 (1976). *Titan* implicitly abrogated the innocent-third-party rule as well; the two rules overlap because the easily-ascertainable-fraud rule only applies when a third-party claimant is involved. In its discussion of the no-fault act, *Titan* also rejected the underlying reasons for the innocent-third-party rule, reasoning that there was no basis in the no-fault act to support the proposition that public policy requires a private business to maintain a source of funds for the benefit of a third party with whom the business has no contractual relationship. The *Titan* Court's reasoning was not dependent on whether the coverage was optional or mandatory under the act because each benefit is predicated on a valid contract between the insured and the insurer. Moreover, public policy does not compel adoption of the innocent-third-party rule. Although an innocent third party might have a reasonable right to expect that other drivers have the minimum coverage required by the no-fault act (like PIP benefits), the innocent party does not have an absolute right by operation of law to hold an insurer liable for the fraud of the insured. Any implication in *Titan* that MCL 500.3101(1), like the example of MCL 500.3009(1) used in *Titan*, limits the availability of rescission because both statutes mandate certain coverage—as opposed to the optional coverage at issue in *Titan*—was nonbinding dicta.

3. In general, fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party. Accordingly, an insurance policy procured by fraud may be declared void *ab initio* at the option of the insurer, with the effect being that the contract is considered never to have existed. A claim to rescind a contract is equitable in nature, and the claim is therefore not strictly of right but instead granted as a remedy in the sound discretion of the trial court. A trial court must balance the equities to determine whether a party is entitled to the rescission the party seeks, and the remedy should not be granted when the result would be unjust or inequitable. In other words,

the trial court must determine which party should assume the loss when both parties affected are equally innocent and blameless. In light of the fact that equity allows complete justice to be done in a case by adapting its judgments to the unique circumstances of each case, an insured's fraud in an application of insurance does not automatically allow the insurer to rescind the policy with respect to third parties. In this case, although the contract with Mimo Investment was void *ab initio* because of Mimo Investment's fraud in the application, the Court of Appeals erred by concluding that the contract was therefore automatically void *ab initio* between Sentinel Insurance and plaintiff. The case was remanded to the trial court to determine whether, in its discretion, the insurance policy could be rescinded between those parties.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings.

Justice MCCORMACK, joined by Justice VIVIANO, dissenting, disagreed with the majority's conclusion that *Titan* abrogated the innocent-third-party rule. *Titan* held that an insurer may use traditional legal and equitable remedies to defend against optional residual-liability insurance unless those remedies are limited by a statute. But unlike the optional residual-liability insurance at issue in *Titan*, PIP benefits are required and mandated by the no-fault act: MCL 500.3101(1) and (5), read together, require the insurer to provide PIP coverage in every policy unless that coverage may be excluded as provided in MCL 500.3017. And the no-fault act provides that all eligible claimants injured in an automobile accident are entitled to PIP benefits from their own insurer, from another insurer in order of priority, or from the Michigan Assigned Claims Plan. Because mandatory PIP coverage arises by statute, the rights and limitations on PIP coverage are governed by that statute; rescission is allowed when it is consonant with the act and is not allowed when it is not. It is not allowed in this case because that remedy is not consonant with the statute's mandate that all eligible claimants are entitled to receive PIP benefits. The majority's reasoning—that the Legislature's failure specifically to exclude the defense of rescission indicates that it survives as an available defense—conflicts with the rules of statutory construction. *Titan* does not provide a doctrinal basis for the majority's decision either, because the innocent-third-party doctrine is distinct from the easily-ascertainable-fraud rule abrogated in *Titan.* The innocent-third-party doctrine is substantively sound: it survived *Titan*, and there is no principled basis to reject it now. The majority's decision to

permit litigation of equitable defenses that conflict with the statute will interfere with the Legislature's expressed priorities: ensuring prompt and assured payment of coverage for eligible claimants and reducing litigation. Only lawyers stand to gain from the majority's remedy—balancing the equities in every case will prove costly and inefficient for insurers and accident victims alike. Justice MCCORMACK would have held that because the act mandates the payment of third-party PIP benefits and explicitly provides for cost-shifting and other remedies for insurers to invoke after payment has been made, the Legislature intended to abrogate those common-law remedies and equitable remedies that conflict with the act. Accordingly, Justice MCCORMACK would have allowed Sentinel to avoid or reduce its obligations relative to the assigned claims insurer, Citizens Insurance Company, by raising defenses permitted by the act, but would not have allowed Sentinel to avoid its PIP obligations by seeking to rescind the policy based on fraud.

1. INSURANCE — NO-FAULT — FRAUD — MISREPRESENTATION BY APPLICANT — RESCISSION OF POLICY — INNOCENT THIRD PARTIES.

Article 3, § 7 of the 1963 Michigan Constitution provides that common-law defenses remain in effect until they expire by their own limitations or are changed, amended, or repealed; an insurer may seek rescission of an automobile insurance policy on the basis of the common-law defense of fraud—even with regard to an innocent third party seeking to recover statutorily mandated personal protection insurance benefits—because the no-fault act does not limit an insurer's ability to rescind a policy on that basis (MCL 500.3101 *et seq*.).

2. INSURANCE — NO-FAULT — INNOCENT-THIRD-PARTY RULE — ABROGATED BY *TITAN*.

The innocent-third-party rule, which provides that an insurer may not rescind benefits for mandatory coverage under an insurance policy as to an innocent third party injured in the accident, was abrogated by *Titan Ins Co v Hyten*, 491 Mich 547 (2012) (MCL 500.3101 *et seq*.).

Gary R. Blumberg, PC (by *Gary R. Blumberg*) and *Mike Morse Law Firm* (by *Michael J. Morse* and *Stacey L. Heinonen*) for Ali Bazzi, Genex Physical Therapy, Inc., and Elite Chiropractic Center, PC.

Plunkett Cooney (by *Mary Massaron* and *Josephine A. DeLorenzo*) for Sentinel Insurance Company.

Amici Curiae:

John A. Braden.

Willingham and Coté, PC (by *John A. Yeager* and *Kimberlee A. Hillock*) for the Insurance Alliance of Michigan.

Kallas & Henk, PC (by *Constantine N. Kallas* and *Michele L. Riker-Semon*) for QBE Insurance Corporation.

Mellon Pries, PC (by *James T. Mellon* and *David A. Kowalski*) for the Michigan Municipal Risk Management Authority.

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Jennifer M. Alberts*) and *Sinas Dramis Brake Boughton & McIntyre PC* (by *George T. Sinas*, *Stephen H. Sinas*, and *Thomas G. Sinas*) for the Coalition Protecting Auto No-Fault.

Sondee, Racine & Doren, PLC (by *Maurice A. Borden*) for the Michigan Defense Trial Counsel.

James G. Gross, PLC (by *James G. Gross*) for the Auto Club Insurance Association.

Donald M. Fulkerson and the *Law Offices of Robert June, PC* (by *Robert B. June*) for the Michigan Association for Justice.

Mark Granzotto, PC (by *Mark Granzotto*) for Southeast Michigan Surgical Hospital LLC and Jamie Letkemann.

WILDER, J. Plaintiff, Ali Bazzi, was injured while driving a vehicle owned by his mother, third-party defendant Hala Baydoun Bazzi, and insured by defendant Sentinel Insurance Company (Sentinel).[1] Plaintiff sued Sentinel for mandatory personal protection insurance (PIP) benefits under Michigan's no-fault act,[2] and Sentinel sought and obtained a default judgment rescinding the insurance policy on the basis of fraud. This Court is now asked to decide whether the judicially created innocent-third-party rule, which precludes an insurer from rescinding an insurance policy procured through fraud when there is a claim involving an innocent third party, survived this Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), which abrogated the judicially created easily-ascertainable-fraud rule. In answer, we hold that *Titan* abrogated the innocent-third-party rule but that the Court of Appeals erred when it concluded that Sentinel was automatically entitled to rescission in this instance. Accordingly, we affirm in part, reverse in part, and remand to the trial court to consider whether, in its discretion, rescission is an available remedy.

I. FACTS AND PROCEEDINGS

Plaintiff sued for PIP benefits after he was injured while driving a vehicle owned by his mother, Hala Bazzi. The vehicle had been leased by LaFontaine Honda to Hala Bazzi for personal and family use. Although Hala Bazzi leased the vehicle in her name, personally, she sought and procured from Sentinel a commercial automobile policy for no-fault coverage, which listed Mimo Investment, LLC, as the insured.

[1] Defendant Citizens Insurance Company is not involved in this appeal.

[2] MCL 500.3101 *et seq*.

Plaintiff's sister, third-party defendant Mariam Bazzi, is the resident agent of Mimo Investment.[3]

Sentinel claimed that the insurance policy was procured through fraud by Hala and Mariam Bazzi because Mimo Investment was a shell company, the vehicle was not being commercially used by Mimo Investment, and no one had disclosed to Sentinel that plaintiff would be a regular driver of the vehicle. Sentinel filed a third-party complaint against Hala and Mariam Bazzi and obtained a default judgment rescinding the policy.[4]

Sentinel then moved for summary disposition of plaintiff's claim, arguing that rescission of the policy made it void *ab initio* and precluded recovery under the policy. The trial court denied the motion on the basis of the innocent-third-party rule, which prevents an insurer from rescinding an insurance policy on the basis of material misrepresentations in the application for insurance as to a claim made by a third party who is innocent of the fraud. After the Court of Appeals denied Sentinel's interlocutory application for leave to appeal, this Court remanded the case to the Court of Appeals for consideration as on leave granted. *Bazzi v Sentinel Ins Co*, 497 Mich 886 (2014).

On remand, the Court of Appeals issued a split, published decision reversing the trial court and remanding for further proceedings. *Bazzi v Sentinel Ins Co*, 315 Mich App 763, 780-782; 891 NW2d 13 (2016). The majority held that the innocent-third-party rule did not survive this Court's decision in *Titan* because there was no meaningful distinction between the easily-ascertainable-fraud rule and the innocent-

[3] Hala and Mariam Bazzi are not involved in this appeal.

[4] Sentinel also sought monetary damages resulting from the misrepresentation and fraud.

third-party rule and because no statute prohibits an insurer from raising a fraud defense with respect to PIP benefits. *Id*. at 772-773, 778-782.

Plaintiff and intervening plaintiffs Genex Physical Therapy, Inc., and Elite Chiropractic Center, PC,[5] filed an application for leave to appeal in this Court, which was granted. *Bazzi v Sentinel Ins Co*, 500 Mich 990 (2017). For the reasons discussed in this opinion, we affirm the Court of Appeals' holding that *Titan* abrogated the innocent-third-party rule and reverse the portion of the Court of Appeals' opinion holding that Sentinel is automatically entitled to rescission. We remand to the trial court to determine whether rescission is available as an equitable remedy as between Sentinel and plaintiff.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366; 817 NW2d 504 (2012). A motion for summary disposition under MCR 2.116(C)(10) shall be granted if there is no genuine issue regarding any material fact and the movant is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). This Court also reviews de novo questions of statutory interpretation and the proper interpretation of a contract. *Titan*, 491 Mich at 553.

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[5] Intervening plaintiffs Genex Physical Therapy, Elite Chiropractic Center, and Transmedic, LLC, intervened in the action to recover payment for the medical services they individually provided to plaintiff for his injuries. Transmedic is not involved in this appeal, and references in this opinion to "intervening plaintiffs" are to Genex Physical Therapy and Elite Chiropractic Center.

III. ANALYSIS

A. THE INNOCENT-THIRD-PARTY RULE DOES NOT SURVIVE *TITAN*

As a general rule, Michigan's no-fault insurance system is "a comprehensive scheme of compensation designed to provide sure and speedy recovery of certain economic losses resulting from motor vehicle accidents." *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 240; 293 NW2d 594 (1980). The Insurance Code has various requirements detailing the benefits that Michigan automobile insurance policies must provide, including PIP benefits, which "are payable to or for the benefit of an injured person or, in the case of his death, to or for the benefit of his dependents." MCL 500.3112. Because "PIP benefits are mandated by statute under the no-fault act, . . . the statute is the 'rule book' for deciding the issues involved in questions regarding awarding those benefits." *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993).

Consequently, automobile insurance contracts are governed by a combination of statutory provisions and the common law of contracts. Insurance policies are contracts " 'subject to the same contract construction principles that apply to any other species of contract.' " *Titan*, 491 Mich at 554, quoting *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). When a provision in an insurance policy is mandated by a statute, the policy and the statute must be construed together as though the statute were part of the policy, and "the rights and limitations of the coverage are governed by that statute." *Titan*, 491 Mich at 554 (quotation marks and citation omitted). In the absence of any applicable statute, however, "the rights and

limitations of the coverage are *entirely contractual* and construed without reference to the statute." *Id*. (emphasis added).

It is well established that common-law defenses "shall remain in force and effect until they expire by their own limitations, or are changed, amended or repealed." Const 1963, art 3, § 7. Legislative amendment of the common law has not been lightly presumed by Michigan appellate courts. *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006), citing *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652 n 17; 513 NW2d 799 (1994). The issue of whether a statute preempts, changes, or amends the common law is one of legislative intent. *Wold Architects & Engineers*, 474 Mich at 233. In ascertaining legislative intent, our first step is to look at the words of the statute. *Id*. Accordingly, unless clearly prohibited by statute, an insurer may continue to avail itself of any common-law defenses, such as fraud in the procurement of the policy. *Titan*, 491 Mich at 554-555.

MCL 500.3112 states, in pertinent part, that "[PIP] benefits are payable to or for the benefit of an injured person or, in the case of his death, to or for the benefit of his dependents." There is no question that PIP benefits are mandated by the statute and that the insurance policy must therefore be read together with the no-fault act; instead, the question is whether the statute prohibits an insurer from availing itself of the defense of fraud.

When the Legislature intends to limit the common-law remedies available to an insurer for misrepresentation or fraud, that intent is clearly reflected in the language employed in the statute. For example, MCL 500.3220—part of the no-fault act—"limits the ability

of a licensed insurer to 'cancel' automobile coverage after a policy has been in effect for at least 55 days." *Titan*, 491 Mich at 557-558, citing MCL 500.3220. Additionally, MCL 257.520(f)(1) of the financial responsibility act, MCL 257.501 *et seq*., explicitly precludes rescission based on fraud or misrepresentations. See MCL 257.520(f)(1) ("The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs . . . [and] no fraud, misrepresentation, assumption of liability or other act of the insured in obtaining or retaining such policy . . . shall constitute a defense as against such judgment creditor."). In this case, however, the plain language of the no-fault act does not preclude or otherwise limit an insurer's ability to rescind a policy on the basis of fraud.[6] Therefore, Sentinel may raise that defense and seek rescission of the no-fault insurance policy.

In the past, Michigan courts have held that the "right to rescind ceases to exist once there is a claim involving an innocent third party" because "[p]ublic policy requires that an insurer be estopped from asserting rescission when a third party has been injured." *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170-171; 505 NW2d 895 (1993), citing *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985), and *Ohio Farmers Ins Co v Mich Mut Ins Co*, 179 Mich App 355, 364-365; 445 NW2d 228 (1989); see also *Morgan v Cincinnati Ins Co*, 411 Mich 267, 273, 277; 307 NW2d 53 (1981) (holding that the intentional burning of a home by one spouse would not bar the

[6] See MCL 500.3101 *et seq*.; MCL 500.3105 (insurer liability); MCL 500.3107 (allowable expenses); *Titan*, 491 Mich at 566-568.

innocent spouse's recovery under a statutory fire insurance policy because the policy named both spouses as "the insured").

A " 'public policy' rationale does not compel the adoption" of such a rule, however, and this Court implicitly abrogated the so-called "innocent-third-party" rule in *Titan*, 491 Mich at 565, 570, 573. In that case, the defendant had her driver's license suspended in January 2007 but expected that it would be restored at a hearing held on August 24, 2007. *Id*. at 551. In the meantime, the defendant sought car insurance from the plaintiff, Titan Insurance Company. *Id*. at 551-552. On the defendant's application, which she signed on August 22, 2007, and postdated August 24, 2007, she stated that her license was not suspended; the defendant's license, however, was not restored until September 20, 2007. *Id*. In February 2008, she crashed the insured vehicle into a vehicle driven by Howard and Martha Holmes. *Id*. at 552.

While investigating the accident, Titan discovered the defendant's misrepresentation. *Id*. Titan sought a declaration that if the Holmes family brought an action against the defendant and prevailed, Titan was not obligated to indemnify the defendant above the minimum liability coverage limits required by the financial responsibility act. *Id*.

The trial court granted summary disposition in favor of the defendant, reasoning that Titan could have easily ascertained whether the defendant's license was valid. *Id*. at 553. The Court of Appeals affirmed,[7] relying on *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568; 242 NW2d 530 (1976). The rule established in *Kurylowicz* prohibited insurers from

[7] *Titan Ins Co v Hyten*, 291 Mich App 445, 463-464; 805 NW2d 503 (2011).

asserting the defense of fraud once an insurable event occurred and there was an innocent, injured third party if the fraud perpetrated by the insured was easily ascertainable by investigation. *Titan*, 491 Mich at 563-564.

This Court held that "an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party." *Id*. at 571. Thus, *Titan* abrogated the judicially created easily-ascertainable-fraud and innocent-third-party rules, and it overruled *Kurylowicz* and its progeny.

We are not persuaded by the argument of plaintiff, intervening plaintiffs, and the Court of Appeals dissent that *Titan* only addressed the easily-ascertainable-fraud rule, and left undisturbed the innocent-third-party rule. See *Bazzi*, 315 Mich App at 790 (BECKERING, J., dissenting). *Titan* recognized that these rules overlap because "the 'easily ascertainable' rule . . . only applies when a third-party claimant is involved." *Titan*, 491 Mich at 563. The *Titan* Court explained that an insurance carrier could resort to traditional legal and equitable remedies, including rescission, even when the fraud was "easily ascertainable *and* the claimant is a third party." *Id*. at 572, 573 (emphasis added). Because these two factors are insufficient to preclude rescission *even when combined*, each factor *on its own* is insufficient to preclude rescission.

Moreover, in *Titan*, this Court rejected the underlying reasons for the innocent-third-party rule in contemplation of the no-fault act:

> [I]t is contended that the "easily ascertainable" rule is required for the protection of third parties. However, there

> is simply no basis in the law to support the proposition that public policy requires a private business in these circumstances to maintain a source of funds for the benefit of a third party with whom it has no contractual relationship. While perhaps authority exists in the Legislature to enact such a law, see, e.g., MCL 500.3172 (pertaining to the Michigan Assigned Claims Facility), this authority has not been exercised by the Legislature in this instance. The no-fault act seeks to protect third parties in a variety of ways, including through tort actions, but it states nothing about altering the common law that enables insurers to obtain traditional forms of relief when they have been the victims of fraud. . . . Absent insurance, the operator of the motor vehicle is personally liable for tort liability. By requiring an insurer to indemnify an insured despite fraud in obtaining an insurance policy, . . . the insured [is relieved] of what would otherwise be the insured's personal obligation in the face of his or her own misconduct. As between the fraudulent insured and the insurer, there can be no question that the former should bear the burden of his or her fraud. [*Id*. at 568-569.]

This rationale applies in full force to the innocent-third-party rule, which, like the easily-ascertainable-fraud rule, also precludes an insurer from raising a fraud defense to deny coverage under an insurance policy procured by fraud. Imposition of the rule would require Sentinel to indemnify Mimo Investment for the benefit of plaintiff despite the fraud that was committed when obtaining the insurance policy, relieving Mimo Investment of what would otherwise be its obligation in the face of its own agent's misconduct.

Plaintiff, intervening plaintiffs, and the Court of Appeals dissent further contend that mandatory liability minimums—including PIP coverage, which is mandatory under MCL 500.3101(1)—must be paid by an insurer under a policy despite any fraud in the acquisition of that policy. In support of this position,

they cite MCL 500.3009(1),[8] which provides the policy coverage minimums for all motor vehicle liability insurance policies, and *Titan*, 491 Mich at 572, in which this Court stated:

> Should Titan prevail on its assertion of actionable fraud, it may avail itself of a traditional legal or equitable remedy to avoid liability under the insurance policy, notwithstanding that the fraud may have been easily ascertainable. *However, as discussed earlier in this opinion, the remedies available to Titan may be limited by statute. . . .*[17]
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> [17] For example, MCL 500.3009(1) provides the policy coverage minimums for all motor vehicle liability insurance policies.
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>
> [Emphasis added.]

The same argument was made in *State Farm Mut Auto Ins Co v Mich Muni Risk Mgt Auth (On Remand)*, 317 Mich App 97, 105; 892 NW2d 451 (2016)

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[8] MCL 500.3009(1) states:

> An automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall not be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless the liability coverage is subject to all of the following limits:
>
> (a) A limit, exclusive of interest and costs, of not less than $20,000.00 because of bodily injury to or death of 1 person in any 1 accident.
>
> (b) Subject to the limit for 1 person in subdivision (a), a limit of not less than $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.
>
> (c) A limit of not less than $10,000.00 because of injury to or destruction of property of others in any accident.

(MURPHY, J., concurring) (reasoning that "[b]y observing that MCL 500.3009(1) limits available remedies for actionable fraud, the Supreme Court effectively telegraphed its view that an insurer would be liable under a policy with respect to liability coverage required by MCL 500.3009(1) in connection to an innocent third party injured by a negligent driver who had fraudulently procured the policy").

We reject the premise that there is a controlling distinction between mandatory coverage, i.e., statutorily mandated PIP benefits, and optional coverage. Whether statutory benefits or optional benefits are at issue, each is predicated on the existence of a valid contract between the insured and insurer. Moreover, our reasoning in *Titan* was not dependent on whether the coverage at issue was mandatory or optional. Rather, we recognized that common-law defenses are available when there are contractual insurance policies but limited when a statute prohibits the defense. *Titan*, 491 Mich at 558, 572. Although PIP benefits are mandated by statute, the no-fault act neither prohibits an insurer from invoking the common-law defense of fraud nor limits or narrows the remedy of rescission. Additionally, because *Titan* considered only optional benefits, there was no reason for this Court to opine on any purported statutory limitations on common-law defenses for mandatory coverage. As such, any implication derived from *Titan*'s footnote 17 and accompanying text that MCL 500.3101(1) somehow limited the availability of rescission—see *Titan*, 491 Mich at 572 & n 17—was nonbinding dicta. *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 313 n 3; 901 NW2d 577 (2017) (" 'Obiter dicta are not binding precedent.' ") (citation omitted). We acknowledge that several lower court opinions have questioned whether permitting rescission of a policy

would be incompatible with the compulsory nature of the no-fault act, particularly after a third party has sustained injury. See, e.g., *Cunningham v Citizens Ins Co of America*, 133 Mich App 471, 481, 484-489; 350 NW2d 283 (1984) (BRENNAN, J., dissenting) (concluding that rescission *ab initio* was not an available remedy to insurers under this state's compulsory insurance scheme); *Kurylowicz*, 67 Mich App 579 (holding that a policy of no-fault insurance becomes absolute once an injury arises), overruled by *Titan*, 491 Mich at 551. However, although an innocent third party might have a reasonable right to expect that other drivers carry the minimum insurance required under the no-fault act, that expectation does not, by operation of law, grant an innocent third party an absolute right to hold an insurer liable for the fraud of the insured. In other words, an insurer has a reasonable right to expect honesty in the application for insurance,[9] and there is nothing in the no-fault act that indicates that the reasonable expectations of an innocent third party surmount the reasonable expectations of the insurer.

Accordingly, we hold that *Titan* abrogated the innocent-third-party rule and that Sentinel is therefore not precluded from raising a defense of fraud.

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[9] *Jacobs v Queen Ins Co*, 183 Mich 512, 520; 150 NW 147 (1914) (noting that "a contract of insurance is one in which the utmost good faith is required of the insured") (quotation marks and citation omitted). See also Barry Zalma, LexisNexis Legal Newsroom, *The Equitable Remedy of Rescission: A Tool to Defeat Fraud*, <https://www.lexisnexis.com/legalnewsroom/insurance/b/insurancelaw/archive/2015/04/21/the-equitable-remedy-of-rescission-a-tool-to-defeat-fraud.aspx> (posted April 21, 2015) (accessed June 11, 2018) (stating that "[i]nsurance contracts, unlike common run-of-the-mill commercial contracts, are considered to be contracts of *utmost good faith*" and that "[e]ach party to the contract of insurance is expected to treat the other fairly in the acquisition and performance of the contract").

B. RESCISSION IS AN EQUITABLE REMEDY, NOT AN ABSOLUTE RIGHT

While we agree with the Court of Appeals majority that *Titan* abrogated the innocent-third-party rule, we do not agree that Sentinel was categorically entitled to rescission.

Generally, "[f]raud in the inducement to enter a contract renders the contract *voidable* at the option of the defrauded party . . . ." 5A Michigan Civil Jurisprudence, Contracts, § 44, p 215 (emphasis added), citing *Tocco v Tocco*, 409 F Supp 2d 816 (ED Mich, 2005), *Star Ins Co v United Commercial Ins Agency, Inc*, 392 F Supp 2d 927 (ED Mich, 2005) (applying Michigan law), *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007), *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239; 733 NW2d 102 (2006), *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636; 534 NW2d 217 (1995), and *Whitcraft v Wolfe*, 148 Mich App 40; 384 NW2d 400 (1985). For that reason, an insurance policy procured by fraud may be declared void *ab initio* at the option of the insurer. *Darnell*, 142 Mich App at 9 (stating that "[w]here a policy of insurance is procured through the insured's intentional misrepresentation of a material fact in the application for insurance, and the person seeking to collect the no-fault benefits is the same person who procured the policy of insurance through fraud, an insurer may rescind an insurance policy and declare it void *ab initio*"), citing *Cunningham*, 133 Mich App 471, and *United Security Ins Co v Comm'r of Ins*, 133 Mich App 38; 348 NW2d 34 (1984). In effect, the insurance policy is considered never to have existed. *United Security Ins Co*, 133 Mich App at 42 (" 'When a policy is cancelled, it is terminated as of the cancellation date and is effective up to such date;

however, when a policy is rescinded, it is considered void ab initio and is considered never to have existed.' "), quoting 8B Appleman, Insurance Law and Practice, § 5011, p 403. Additionally, "[u]nless rescinded, a voidable contract imposes on the parties the same obligations as if it were not voidable." 1 Williston, Contracts (4th ed), § 1:20, p 76.

Rescission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made. *Wall v Zynda*, 283 Mich 260, 264-265; 278 NW 66 (1938).[10] Because a claim to rescind a transaction is equitable in nature, it "is not strictly a matter of right" but is granted only in "the sound discretion of the court." *Amster v Stratton*, 259 Mich 683, 686; 244 NW 201 (1932). See *id*. (stating that "[e]quitable relief . . . is not strictly a matter of right, but rather a remedy, the granting of which rests in the sound discretion of the court"); *Windisch v Mortgage Security Corp of America*, 254 Mich 492, 495; 236 NW 880 (1931) (stating that one who seeks equity must "do equity") (quotation marks and citation omitted); *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982) (stating that rescission is "an equitable remedy which

[10] Additionally,

> [r]escission abrogates a contract completely. All former contract rights are annulled, and it is as if no contract had been made. Thus, to rescind a contract is not merely to terminate it, but to undo it from the beginning, and the effect of rescission is not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission involves a restoration of the status quo. [5A Michigan Civil Jurisprudence, Contracts, § 215, pp 439-440 (citations omitted).]

is granted only in the sound discretion of the court"), citing *Harris v Axline*, 323 Mich 585; 36 NW2d 154 (1949), and *Hathaway v Hudson*, 256 Mich 694; 239 NW 859 (1932). See also *Browne v Briggs Commercial & Dev Co*, 271 Mich 191, 194; 259 NW 886 (1935) (stating that "[t]he equitable remedy of rescission is one of grace"); 12A CJS, Cancellation of Instruments, § 11, p 507 (stating that "[t]he fact that the rescission of a contract is an available remedy does not lead to the conclusion that it is required").[11]

When a plaintiff is seeking rescission, "the trial court must balance the equities to determine whether the plaintiff is entitled to the relief he or she seeks." *Johnson v QFD, Inc*, 292 Mich App 359, 370 n 3; 807 NW2d 719 (2011). Accordingly, courts are not required to grant rescission in all cases. For example, "rescission should not be granted in cases where the result thus obtained would be unjust or inequitable," *Amster*, 259 Mich at 686, or "where the circumstances of the challenged transaction make rescission infeasible," CJS, § 11, p 507. Moreover, when two equally innocent parties are affected, the court is "required, in the exercise of [its] equitable powers, to determine which

[11] Unlike an action for rescission, a suit for damages is an action at law, see *King v Gen Motors Corp*, 136 Mich App 301, 308; 356 NW2d 626 (1984), and actions at law are founded on a party's absolute right, rather than on an appeal left to the discretion of the court, see *Hathaway*, 256 Mich at 702. A plaintiff, however, is not required to elect between the remedies of rescission and damages. *Jefferson Park Land Co v Wayne Circuit Judge*, 234 Mich 341, 345-346; 207 NW 903 (1926). Furthermore, when a contract is not rescinded, the defrauded insurer may still recover damages on the basis of fraud. See *Hedler v Manning*, 252 Mich 195, 197; 233 NW 223 (1930) ("A bill for rescission with alternative prayer for damages for fraud if rescission be impracticable is well laid."); *Glover v Radford*, 120 Mich 542, 544; 79 NW 803 (1899) ("If there was fraud, and he did not succeed in rescinding the contract, he certainly ought to have the right to recover damages for the injury he had suffered, if any.").

blameless party should assume the loss . . . ." *Lenawee*, 417 Mich at 31. "[W]here one of two innocent parties must suffer by the wrongful act . . . of another, that one must suffer the loss through whose act or neglect such third party was enabled to commit the wrong." *Zucker v Karpeles*, 88 Mich 413, 430; 50 NW 373 (1891). "The doctrine is an equitable one, and extends no further than is necessary to protect the innocent party in whose favor it is invoked." *Id*.

In this instance, rescission does not function by automatic operation of the law. Just as the intervening interest of an innocent third party does not altogether bar rescission as an equitable remedy, neither does fraud in the application for insurance imbue an insurer with an absolute right to rescission of the policy with respect to third parties. Equitable remedies are adaptive to the circumstances of each case, and an absolute approach would unduly hamper and constrain the proper functioning of such remedies. This Court has recognized that "[e]quity jurisprudence molds its decrees to do justice amid all the vicissitudes and intricacies of life" and that "[e]quity allows complete justice to be done in a case by adapting its judgments to the special circumstances of the case." *Tkachik v Mandeville*, 487 Mich 38, 45-46; 790 NW2d 260 (2010) (quotation marks omitted), citing *Spoon-Shacket Co, Inc v Oakland Co*, 356 Mich 151, 163; 97 NW2d 25 (1959), and 27A Am Jur 2d, Equity, § 2, pp 520-521; see also *Lenawee*, 417 Mich at 29 (adopting a case-by-case approach to rescission when a "mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties"), and Am Jur 2d, § 2, pp 548-549.

Accordingly, although the policy between Sentinel and the insured, Mimo Investment, is void *ab initio* due to the fraudulent manner in which it was acquired, the trial court must now determine whether, in its discretion, rescission of the insurance policy is available as between Sentinel and plaintiff.[12] Therefore, we remand this matter to the trial court to exercise its discretion. *Lenawee*, 417 Mich at 31.

IV. CONCLUSION

We affirm the Court of Appeals' holding that *Titan* abrogated the innocent-third-party rule and reverse the portion of the Court of Appeals' opinion that held Sentinel was automatically entitled to rescission by operation of law. We remand to the trial court to determine whether rescission is available as an equitable remedy as between Sentinel and plaintiff.

MARKMAN, C.J., and ZAHRA, BERNSTEIN, and CLEMENT, JJ., concurred with WILDER, J.

MCCORMACK, J. (*dissenting*). In *Titan Ins Co v Hyten*, 491 Mich 547, 550-551; 817 NW2d 562 (2012), we held that an insurer may avail itself of traditional legal and equitable remedies to defend against optional residual-liability insurance unless those remedies are limited by statute. We cited MCL 500.3009(1)—the statutory provision mandating minimum residual-liability coverage—as an example of such a statutory limit. *Id*. at 572 n 17. Because mandatory coverage was not at issue in *Titan*, we construed the policy as an ordinary

[12] If the insurer could not rescind as to the third parties, but could rescind as to any claims by the fraudulent insured, then the policy would not be fully rescinded; rather it would be considered reformed. 1 Dobbs, Law of Remedies (2d ed), § 4.3(7), pp 617-618.

contract. And provisions in ordinary contracts are enforceable unless contrary to law or public policy. Therefore, we looked for any law or public policy that expressly forbade rescission of an optional insurance contract and found none. This case is almost a perfect mirror-image of *Titan*—involving statutorily mandated personal protection insurance (PIP) benefits, in contrast to *Titan*'s optional contractual residual-liability insurance—yet the majority applies *Titan*'s optional-coverage standard.

I respectfully dissent. PIP benefits arise out of the no-fault act (alternatively, the Act), MCL 500.3101 *et seq*., and we must construe a no-fault policy and the Act together as though the statutes were a part of the contract. *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993). I would hold that MCL 500.3101 limits rescission of PIP benefits, just as MCL 500.3009(1) limits rescission of residual-liability coverage. Rescission is available when consistent with the Act and not available when inconsistent with the Act.

The Legislature has created a comprehensive statutory scheme that guarantees PIP benefits will be paid to all eligible claimants—it's just a question of who must pay them. Innocent third parties are always eligible claimants. See MCL 500.3113 (listing those persons who are not entitled to PIP benefits). And because the insurer bears the cost of PIP coverage for innocent third parties whether they rescind the policy or not, the majority's decision—requiring equitable balancing in each case—has built a bridge to nowhere. When benefits are mandated, an insurer has only two options: pay now, or reimburse later. Requiring costly litigation to determine in every case who will be the payor and who will be the reimbursor is an exercise in

futility and is contrary to the Act's purpose—to ensure prompt coverage and to reduce litigation. Instead, today's decision will delay coverage and increase litigation—a coup for lawyers at their clients' expense. I would hold that Sentinel may not independently seek to rescind the PIP coverage mandated by the no-fault act but that Sentinel may seek to avoid or reduce its obligations relative to the assigned claims insurer, Citizens Insurance Company, by raising defenses permitted by the Act.[1]

I. CONTRACTUAL VERSUS STATUTORY COVERAGE

A. *TITAN* WAS NOT A NO-FAULT CASE

Titan does not answer the question asked here because it analyzed coverage that arose solely by contract. Contrary to the majority's assertion, *Titan*'s holding rested *entirely* on the premise that there is a controlling difference between benefits required by statute and optional benefits in excess of any statutory requirement. We stated:

> [W]hen a provision in an insurance policy is mandated by statute, the rights and limitations of the coverage are governed by that statute. On the other hand, when a provision in an insurance policy is not mandated by statute, the rights and limitations of the coverage are entirely contractual and construed without reference to the statute. [*Titan*, 491 Mich at 554 (citation omitted).]

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[1] See, e.g., MCL 500.3172(3)(f) ("After hearing the action, the circuit court shall determine the insurer or insurers, if any, obligated to provide the applicable personal protection insurance benefits and the equitable distribution, if any, among the insurers obligated, and shall order reimbursement to the Michigan automobile insurance placement facility from the insurer or insurers to the extent of the responsibility as determined by the court.").

This wasn't a new idea: in *Rohlman*, 442 Mich at 524-525, we stated that "the insurance policy itself, which is the contract between the insurer and the insured, controls the interpretation of its own provisions providing benefits not required by statute." The dispute in *Titan* concerned only the latter category—benefits not required by statute.

Titan was simply not a no-fault case. It was a private contract dispute, so contract remedies applied as long as they were not statutorily prohibited. We therefore searched (in vain) for any express statutory restriction on the insurer's fraud defense, because the disputed benefits arose purely by contract and a contract must be enforced as written unless contrary to law or public policy. See *Rory v Continental Ins Co*, 473 Mich 457, 469; 703 NW2d 23 (2005). Finding no such restriction, we concluded in *Titan* that the insurer could avail itself of equitable remedies to avoid the purely contractual coverage.

This was not a novel approach to interpreting statutes or contracts. It was not statutory interpretation at all, because there was no statutory coverage in dispute. And it was not a novel approach to interpreting a contract: we apply contracts as written as long as the contract's terms are legal. "[U]nambiguous contracts, including insurance policies, are to be enforced as written unless a contractual provision violates law or public policy." *Rory*, 473 Mich at 491. Contract remedies like rescission play by those same rules: they cannot be exercised in a manner contrary to law or public policy. "It is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid where the

plaintiff is using the right asserted contrary to the public interest." *Morton Salt Co v G S Suppiger Co*, 314 US 488, 492; 62 S Ct 402; 86 L Ed 363 (1942), abrogated on other grounds by *Illinois Tool Works Inc v Indep Ink, Inc*, 547 US 28; 126 S Ct 1281; 164 L Ed 2d 26 (2006).

B. THE STATUTE GOVERNS MANDATORY COVERAGE

When benefits *are* required by statute, however, we must look to the statute for the available remedies. Also not new. For just one example, see what we said in *Titan*: "when a provision in an insurance policy is mandated by statute, the rights and limitations of the coverage are governed by that statute." *Titan*, 491 Mich at 554. *Titan* simply adhered to our traditional approach. "It is a familiar and fundamental rule of construction of a private automobile insurance policy that the court's first duty is to determine, from the language used, the apparent intention of the contracting parties . . . . The language of a statute, on the other hand, is required to be construed by assigning to the words used their primary and generally understood meaning consistent with the apparent intention of the Legislature in enacting the law." *Royal Globe Ins Cos v Frankenmuth Mut Ins Co*, 419 Mich 565, 573; 357 NW2d 652 (1984) (citations omitted).

PIP benefits are required by statute. "PIP benefits are mandated by statute under the no-fault act, and, therefore, the statute is the 'rule book' for deciding the issues involved in questions regarding awarding those benefits." *Rohlman*, 442 Mich at 524-525 (citations omitted). And unlike the residual-liability coverage at issue in *Titan*—that is, optional coverage in excess of the mandatory minimum coverage that is required by

the Act—there is no such thing as *optional* PIP coverage. There is no mandatory/optional distinction because PIP coverage is self-limiting—it covers only medical expenses and lost income.[2] PIP coverage is mandatory in every insurance policy issued in Michigan, and the statute sets the floor and the ceiling for the coverage.[3]

In this way, PIP benefits operate just like the minimum residual-liability coverage we identified in *Titan* as a statutory limit against rescission. That section, MCL 500.3009(1), states:

> An automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall not be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless the liability coverage is subject to all of the following limits:

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[2] An insurer's liability for PIP benefits is limited, however, by membership in the Michigan Catastrophic Claims Association (MCCA). All insurers who write automobile insurance policies must be members of the MCCA, which provides "indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages" that exceed a certain dollar amount calculated biennially (at present, somewhere in the neighborhood of $500,000). MCL 500.3104(2); see also MCL 500.3104(3).

[3] The coordination-of-benefits provision, MCL 500.3109a, proves again the point: an insurer who provides PIP benefits "may offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured." But any exclusion or deductible cannot change the absolute level of PIP coverage mandated by statute—coordination permits cost-sharing between insurers, but a no-fault insurer is released from liability only for medical expenses that "the insured's health care insurer is required, under its contract, to pay for or provide." *Tousignant v Allstate Ins Co*, 444 Mich 301, 303; 506 NW2d 844 (1993).

> (a) A limit, exclusive of interest and costs, of not less than $20,000.00 because of bodily injury to or death of 1 person in any 1 accident.
>
> (b) Subject to the limit for 1 person in subdivision (a), a limit of not less than $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.
>
> (c) A limit of not less than $10,000.00 because of injury to or destruction of property of others in any accident.

The statute requires that every policy provide this 20/40/10 minimum coverage.

PIP coverage is similar. MCL 500.3101(1) requires all owners and operators to maintain security for some benefits, including "personal protection insurance," or PIP. MCL 500.3101(1) ("The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance."). The details of the mandated PIP coverage are spelled out in the sections that follow. MCL 500.3101(1) *et seq*. Read alone, this provision seems to differ from MCL 500.3009(1) in that the owner or operator is obligated to obtain the proper coverage.

But there's more. The insurer is also obligated to provide this coverage when Subsection (1) is read together with Subsection (5). MCL 500.3101(5) states, "An insurer that issues a policy that provides the security required under subsection (1) may exclude coverage under the policy as provided in section 3017." By expressly permitting insurers to exclude coverage only under enumerated circumstances (not relevant here), in all other circumstances an insurer may not issue a policy without PIP coverage, property protection insurance, and residual-liability insurance.

See *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) (stating that enumeration of exceptions or conditions "eliminates the possibility of [there] being other exceptions under the legal maxim *expressio unius est exclusio alterius*").

I see no way to distinguish the mandate to provide PIP coverage from the mandate to provide minimum residual-liability coverage we highlighted in *Titan*. This leads me to the seemingly uncontroversial conclusion that mandatory PIP coverage arises by statute and that we must therefore look to the text of the statute to determine an insurer's remedies to avoid its statutory obligations. Just as we said in *Titan*. When rescission is consonant with the statute it is permitted and when it is not, not.

C. THIRD-PARTY CLAIMANTS' ENTITLEMENT TO PIP BENEFITS

The no-fault act provides ample guidance for an insurer that seeks to avoid its statutory obligations. The Legislature set up a comprehensive scheme in which insurers generally are expected to pay first and seek reimbursement later.

The Act makes plain who is eligible, and who pays. Anyone who suffers "accidental bodily injury arising from a motor vehicle accident" can claim benefits from their own policy or from another insurer in order of statutory priority. MCL 500.3114(4). If no insurer can be identified, the Michigan Assigned Claims Plan (MACP) is the insurer of last resort. MCL 500.3171. All insurers who write no-fault policies in Michigan receive a portion of MACP cases, allocated by market share. All eligible claimants injured in a motor vehicle accident are thus entitled to PIP benefits from *someone* unless one of the five exceptions in MCL 500.3113 applied at the time of

the accident.[4] MCL 500.3113(c) excludes nonresident occupants in vehicles that are not registered in Michigan or insured under the Act; that exclusion is, of course, irrelevant to our determination of the rights and limitations on PIP coverage governed by the Act. Because none of the remaining exceptions in MCL 500.3113 can apply to *innocent* third parties, those innocent third parties are entitled to PIP benefits.

The Act makes the timing of payment similarly clear. An insurer must timely pay PIP benefits to claimants: PIP benefits become payable once loss accrues and "are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). The insurer must pay all benefits to or for the benefit of the injured person or, in death, to his or her dependents.

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[4] MCL 500.3113 provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully.
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.
>
> (c) The person was not a resident of this state, was an occupant of a motor vehicle or motorcycle not registered in this state, and the motor vehicle or motorcycle was not insured by an insurer that has filed a certification in compliance with section 3163.
>
> (d) The person was operating a motor vehicle or motorcycle as to which he or she was named as an excluded operator as allowed under section 3009(2).
>
> (e) The person was the owner or operator of a motor vehicle for which coverage was excluded under a policy exclusion authorized under section 3017.

MCL 500.3112. If the insurer is in any doubt about the party who should receive the payment, it may ask the circuit court for an order apportioning the benefits equitably between the proper parties. *Id*.[5] As we have said before, the no-fault act was enacted "to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978). Consistently with this goal, the Act requires insurers to make prompt payment to eligible claimants, with few exceptions.

When the Act's preference for prompt payments leads to mistakes, it provides remedies for insurers. If an insurer believes it was not obligated to pay a claimant's PIP benefits, the Act provides various avenues for shifting losses to the appropriate insurer after the fact. If, for example, two or more insurers are in the same order of priority, "an insurer paying benefits due is entitled to partial recoupment from the other insurers . . . in order to accomplish equitable distribution of the loss among all of the insurers." MCL 500.3114(6). Alternatively, a claim may be assigned to the MACP if

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[5] MCL 500.3112 states, in relevant part:

> Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate.

> no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. [MCL 500.3172(1).]

The Act provides detailed procedures for resolving disputes between two or more insurers over their obligation to provide PIP benefits. MCL 500.3172(3) states:

> If the obligation to provide personal protection insurance benefits cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, and if a method of voluntary payment of benefits cannot be agreed upon among or between the disputing insurers, all of the following apply:
>
> (a) The insurers who are parties to the dispute shall, or the claimant may, immediately notify the Michigan automobile insurance placement facility of their inability to determine their statutory obligations.
>
> (b) The claim shall be assigned by the Michigan automobile insurance placement facility to an insurer and the insurer shall immediately provide personal protection insurance benefits to the claimant or claimants entitled to benefits.
>
> (c) An action shall be immediately commenced on behalf of the Michigan automobile insurance placement facility by the insurer to whom the claim is assigned in circuit court to declare the rights and duties of any interested party.
>
> (d) The insurer to whom the claim is assigned shall join as parties defendant to the action commenced under

> subdivision (c) each insurer disputing either the obligation to provide personal protection insurance benefits or the equitable distribution of the loss among the insurers.
>
> (e) The circuit court shall declare the rights and duties of any interested party whether or not other relief is sought or could be granted.
>
> (f) After hearing the action, the circuit court shall determine the insurer or insurers, if any, obligated to provide the applicable personal protection insurance benefits and the equitable distribution, if any, among the insurers obligated, and shall order reimbursement to the Michigan automobile insurance placement facility from the insurer or insurers to the extent of the responsibility as determined by the court. The reimbursement ordered under this subdivision shall include all benefits and costs paid or incurred by the Michigan automobile insurance placement facility and all benefits and costs paid or incurred by insurers determined not to be obligated to provide applicable personal protection insurance benefits, including reasonable, actually incurred attorney fees and interest at the rate prescribed in section 3175 as of December 31 of the year preceding the determination of the circuit court.

The Act's pay-first-and-haggle-later instructions to insurers further establish a clear intent to promptly cover PIP benefits for eligible claimants—like innocent third parties—one way or another.

In short, the no-fault act created a comprehensive statutory scheme that provides PIP coverage for all eligible claimants. The Act requires that PIP benefits be paid within 30 days of a claim. And because payment obligations may not be clear within 30 days, it provides mechanisms for a promptly paying insurer to recoup those payments from another insurer, dispute the obligation to pay benefits in the circuit court (after first assigning the claim to an MACP insurer for

payment), or sue the owner of an uninsured vehicle for recovery of PIP benefits paid.

Permitting litigation of equitable defenses that conflict with the statute will upend the Legislature's clear expression of its priorities. The Act demands prompt, adequate, and assured payment of PIP benefits to eligible claimants, even though prompt and assured payments may be—at least temporarily—inequitable for an insurer. The Act's menu of remedies further underscores the Legislature's expressed preferences in favor of the eligible claimant: temporary inequity is answered by the statutory remedies of recoupment, reimbursement, and equitable distribution of losses. The judiciary is not at liberty to impose its preferences in contravention of these legislative choices. Cf. *Trentadue v Buckler Lawn Sprinkler Co*, 479 Mich 378, 392; 738 NW2d 664 (2007) ("Because the statutory scheme here is comprehensive, the Legislature has undertaken the necessary task of balancing plaintiffs' and defendants' interests and has allowed for [equitable] tolling only where it sees fit.").

D. THE FUTILITY OF EQUITABLE BALANCING WITH INNOCENT THIRD PARTIES

The Act created a system in which all insurers share the cost of eligible claims from innocent third parties in proportion to the insurer's market share. If Sentinel avoids any obligation to pay PIP benefits here, Citizens Insurance—the MACP insurer—will pick up the tab. The MACP will reimburse Citizens Insurance for the payments and the established loss adjustment cost, plus interest. MCL 500.3171. Claims and the losses from those claims are assigned to all insurers (including Sentinel, of course) proportionally.

Given this statutory scheme, I don't see what advantage rescission provides an insurer in any event. Rescission of third-party PIP benefits makes financial sense only if the insurer stands to prevent the claimant from receiving PIP benefits entirely, thus reducing the insurer's proportion of MACP costs. If the claimant is a third party and otherwise eligible for PIP benefits, such a result is impermissible under the statute. And so the innocent-third-party doctrine is consonant with (or a useful shorthand for) that statutory requirement.[6] PIP benefits are mandatory, governed by statute, and are available from one source or another unless one of the five exceptions in MCL 500.3113 applies.

Rescission would benefit an insurer if it would eliminate a claimant's entitlement to PIP benefits entirely.[7] But under the statute, that should never be the case for an innocent third party; although a third party might be rendered ineligible for PIP benefits on the basis of his or her own wrongdoing, see MCL 500.3113(a) and (d) (that is, when the third party is *not*

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[6] Whether the statute can preclude rescission of the insured's own policy is a separate question, but it highlights why the innocent-third-party doctrine comports with the statutory scheme. The Legislature specifically excluded uninsured owners or operators from PIP eligibility entirely, going so far as to allow "[a]n insurer obligated to pay personal protection insurance benefits for accidental bodily injury to a person arising out of the ownership, maintenance, or use of an uninsured motor vehicle as a motor vehicle may recover such benefits paid and appropriate loss adjustment costs incurred from the owner or registrant of the uninsured motor vehicle or from his or her estate." MCL 500.3177(1).

[7] Rescission might be appropriate, for example, if it would serve the statutory imperative that an uninsured owner or operator cannot get PIP coverage under MCL 500.3113(b). To illustrate—if Hala Bazzi had been injured and claimed PIP benefits, rescission would render her ineligible for PIP benefits as the "owner or registrant of [the uninsured] motor vehicle . . . involved in the accident" because a fraudfeasor can't benefit from his or her fraud. *Id*. But for an innocent third party, rescission merely shifts the costs of benefits from one insurer to another.

innocent), even rescission of an insurance policy for fraud would not affect an *innocent* third party's entitlement to PIP benefits—the no-fault act requires prompt payment of PIP benefits by the putative insurer (or the MACP if the coverage is in dispute) for eligible claimants, including all innocent third parties, and then provides remedies to divide the costs fairly among insurers after the fact. I don't see how the majority's opinion allowing litigation about rescission changes any outcome in an innocent-third-party claim; the statute already provides remedies for insurers, and innocent third parties must be covered one way or another.

The majority's reasoning for permitting this new layer of litigation, despite the comprehensiveness of the Act's approach to remedies for insurers like Sentinel, is that it believes that the Legislature's failure specifically to exclude the defense of rescission means that it must survive as an available defense. But this novel approach cannot be reconciled with traditional principles of statutory interpretation. "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987), citing 2A Sands, Sutherland Statutory Construction (4th ed), § 50.05, pp 440-441; see also *Hoerstman Gen Contracting, Inc*, 474 Mich at 75 (concluding that when "the language of the statute shows that the Legislature covered the entire area, . . . [i]t clearly intended that the statute would abrogate the common law on this subject"). There are no rights under the no-fault act except those expressly con-

ferred. See *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 217; 895 NW2d 490 (2017). Moreover, there is no saving clause in the no-fault act. Looking to comparable statutory schemes, even saving clauses are inadequate to preserve preexisting rights that conflict with a comprehensive statute.[8] The Act "prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions . . . ." *Millross*, 429 Mich at 183. Its provisions on PIP coverage show that "[i]t is intended to apply to nearly every situation involving" PIP benefits. *Hoerstman Gen Contracting, Inc*, 474 Mich at 74. As we have warned before, "[s]tatutes lose their meaning if 'an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity.' " *Trentadue*, 479 Mich at 407, quoting *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 591; 702 NW2d 539 (2005).

[8] See, e.g., *AT&T Mobility LLC v Concepcion*, 563 US 333, 343; 131 S Ct 1740; 179 L Ed 2d 742 (2011) (Federal Arbitration Act) (a federal statute's saving clause "cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself") (cleaned up); *Pilot Life Ins Co v Dedeaux*, 481 US 41, 54; 107 S Ct 1549; 95 L Ed 2d 39 (1987) (ERISA) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."), quoting *Massachusetts Mut Life Ins Co v Russell*, 473 US 134, 147; 105 S Ct 3085; 87 L Ed 2d 96 (1985) (cleaned up); *United States v Locke*, 529 US 89, 106; 120 S Ct 1135; 146 L Ed 2d 69 (2000) (Oil Pollution Act) ("We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law."); *Northwest Airlines, Inc v Transp Workers Union of America, AFL-CIO*, 451 US 77, 98; 101 S Ct 1571; 67 L Ed 2d 750 (1981) (Title VII) ("[A] favorable reaction to the equitable considerations supporting petitioner's contribution claim is not a sufficient reason for enlarging on the remedial provisions contained in these carefully considered statutes.").

I am unconvinced, and therefore I am unwilling to rewrite this comprehensive statutory scheme by holding that the Legislature's failure to enumerate a list of all prohibited defenses means that an insurer can invoke rescission in a way that disrupts the legislative PIP mandate.

And the majority's decision to do so yields strange results indeed. If Hala Bazzi had no insurance policy, Ali Bazzi could have received prompt and assured PIP coverage through an MACP insurer. The same result would obtain if *two* insurers tried to rescind coverage. MCL 500.3172. Yet a single insurer can seek to rescind a policy and the entire process grinds to a halt. The injured innocent third party, who is unquestionably entitled to PIP coverage under the statute, is stuck in the middle of protracted litigation over which insurer has to foot the bill. And *cui bono*? It's unclear what good-faith motive would drive an insurer to seek rescission of an otherwise eligible claimant's PIP coverage. As far as I can tell, the only way an insurer can do better than break even on an innocent third party's PIP coverage is if they manage to rescind the policy *and* prevent the third party from receiving PIP benefits from an MACP insurer—presumably by running out the clock on the notice period, a tactic that is plainly impermissible under the Act. I am not willing to impute that level of bad faith to anyone.[9] Yet there is one set of

[9] And of course, an insurer who invokes equity as a dilatory tactic runs the risk that the chancellor catches on and cheerfully does "that which ought to be done." *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958) ("[C]hancery will not permit one to enrich himself at the expense of another by closing its eyes to what is clear to the rest of mankind. Equity, to paraphrase, regards that as seen which ought to be seen, and, having so seen, as done that which ought to be done."); see also *Windisch v Mtg Security Corp of America*, 254 Mich 492, 493-494; 236 NW 880 (1931) ("[O]ne who seeks equity must do equity.").

stakeholders who stand to benefit greatly from the court's decision today—lawyers. As attorneys enjoy the influx of billable hours from the extra round of litigation about the equities, their clients—insurers and accident victims alike—will see only mounting expenses.

Unlike in *Titan*, there is no policy justification for this result. In that case, *residual-liability* coverage was at issue. The purpose of residual-liability coverage is to indemnify the insured for a tort judgment. So although residual-liability benefits are payable to a third party to satisfy a civil judgment, the *beneficiary* of the indemnity is the insured fraudfeasor, who is personally liable for the judgment. PIP benefits for an innocent third party, however, are not a windfall for the fraudfeasor because the beneficiary of the third party's medical care is, of course, the third party. And third-party PIP coverage is not only not a windfall, the fraudfeasor may be sued for an insurer's losses in covering the claim. MCL 500.3177(1).

II. *TITAN* DID NOT ABROGATE THE INNOCENT-THIRD-PARTY DOCTRINE

A. THE INNOCENT-THIRD-PARTY DOCTRINE IS DISTINCT FROM THE EASILY-ASCERTAINABLE-FRAUD RULE

I am not persuaded by the majority's view that our opinion in *Titan* abrogated the innocent-third-party doctrine either.

First, the doctrinal weakness: our opinion in *Titan* never mentioned the innocent-third-party doctrine. One explanation for this silence is that *Titan* did not address the innocent-third-party doctrine because the doctrine was not before us. The majority accepts an alternative explanation: perhaps *Titan* failed to mention the innocent-third-party doctrine because it is synonymous with the easily-ascertainable-fraud rule. This follows,

the majority says, because the easily-ascertainable-fraud rule also applies to claims by third parties. The majority reasons that because *Titan* held that rescission was available "even when the fraud was easily ascertainable *and* the claimant is a third party," *Titan*, 491 Mich at 571 (emphasis added), third-party status alone cannot preclude rescission. But the majority makes a logical misstep—it assumes that third-party status is the only relevant factor on which to compare the two rules.

Precedent does not support this theory. Courts must specify what they mean when eliminating a common-law doctrine, generally by defining the contours of that doctrine in caselaw. *Titan* did just that. It overruled *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568; 242 NW2d 530 (1976), and its progeny and reaffirmed *Keys v Pace*, 358 Mich 74; 99 NW2d 547 (1959). *Kurylowicz* did not create an innocent-third-party rule—it acknowledged the circumstances under which the innocent-third-party doctrine might apply, but stressed that it need not consider those circumstances.[10]

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[10] The *Kurylowicz* panel stated:

> It is the policy of this state that persons who suffer loss due to the tragedy of automobile accidents in this state shall have a source and a means of recovery. Given this policy, it is questionable whether a policy of automobile liability insurance can ever be held void *ab initio* after injury covered by the policy occurs. Generally, it is held that:
>
> > "The liability of the insurer with respect to insurance required by the act becomes absolute whenever injury or damage covered by such policy occurs * * * no statement made by the insured or on his behalf and no violation of the policy provisions may be used to defeat or avoid the policy." 1 Long, The Law of Liability Insurance, § 3.25 pp 3-83-84. See *Detroit Automobile Inter-Insurance Exchange v Ayvazian*, 62 Mich App 94; 233 NW2d 200 (1975).
>
> That issue is not before us in this case, so we need not decide it. [*Kurylowicz*, 67 Mich App at 574.]

It is strange, then, to say that *Kurylowicz* and its progeny are stand-ins for a doctrine that *Kurylowicz* itself recognized as distinct. Moreover, even if the two doctrines converged over time, *Titan* overruled three other cases that *did* acknowledge the innocent-third-party doctrine—*Kurylowicz*'s "progeny"—but took care to overrule the decisions only to the extent that they "held or stated that an insurer is estopped from denying coverage on the basis of fraud when it could have easily ascertained the fraud . . . ." *Titan*, 491 Mich at 551 n 1, citing *Ohio Farmers Ins Co v Mich Mut Ins Co*, 179 Mich App 355, 357-358, 362-363; 445 NW2d 228 (1989), *Farmers Ins Exch v Anderson*, 206 Mich App 214, 219; 520 NW2d 686 (1994), and *Manier v MIC Gen Ins Corp*, 281 Mich App 485, 489-490; 760 NW2d 293 (2008).

The majority is correct that both doctrines appear to apply to the same people (third parties), but similarity on that single dimension is not dispositive. The innocent third party is a particular subset of third parties, of course. She must be *innocent*. And therefore the doctrine is consonant with the statute: a third party who drives a stolen vehicle (§3113(a)) or drives a vehicle despite being named as an excluded operator (§3113(d)) is ineligible for PIP benefits. The easily-ascertainable-fraud rule did not explicitly make that distinction.

Instead, I am persuaded by the distinction Judge BECKERING drew—the two doctrines announced different thresholds for rescission depending on the *origin* of the coverage in question. An insurer's ability to rescind optional coverage was far more expansive—rescission of coverage above the statutory floor was only precluded if the insurer itself was blameworthy. In other words, the right to seek rescission of optional coverage

was the insurer's right to lose. If the insurer failed to exercise even the minimum of reasonable care before binding itself to an insurance contract, why should equity rescue it from its obligation to a third party? As between these two actors, the insurer was the cheapest cost avoider. But if the insurer acted reasonably yet still fell victim to fraud, it would be unfair to require it to pay out the benefits that arose from the parties' infirm contract. So went the easily-ascertainable-fraud rule.

But what if the parties' rights and obligations arise and are governed by statute? If coverage is mandated by statute, then the statute defines the circumstances in which rescission is available. These mandatory policy provisions are in no sense bargained for.[11] Instead, they are the default starting point of every insurance policy. And the Act makes plain the Legislature's intention that innocent third parties' medical expenses be covered in the event of an accident, whether by the insurer linked with the vehicle involved in the accident or through the MACP.

This principle comports with the no-fault act, but it also makes sense from an equitable standpoint that different rules developed depending on the source of coverage—the parties bargain for additional coverage, and it is tacked on to a standard set of state-mandated provisions that cannot be negotiated. *Titan* recognized

[11] The premium the insurer might charge for those provisions may have been bargained for, but the insurer could likely remedy that defect by seeking money damages at law or reformation in equity. *See Benton Harbor Sch Dist v State Tenure Comm*, 372 Mich 270, 273-274; 126 NW2d 102 (1964) (stating that equitable relief is unavailable if there is a remedy at law that is reasonably speedy and adequate); *Amster v Stratton*, 259 Mich 683, 688; 244 NW 201 (1932) (concluding that reducing the contract price was more equitable than permitting rescission).

this distinction implicitly. The statutory and contractual provisions of the insurance policy were effectively treated as severable—rather than speaking in terms of *reforming* the contract, we eliminated the easily-ascertainable-fraud rule and held that, because the disputed coverage was not governed by the Act, the insurer was entitled to avail itself of all traditional legal and equitable remedies to avoid the optional coverage. But as I explained, the validity of the innocent-third-party doctrine was not before us in *Titan*, because there was simply no dispute over the statutory benefits it protects.

The result of the majority's opinion only fuels my skepticism: It recognizes that there are no per se rules in equity and therefore remands for the trial court to balance the equities. Although Sentinel prevailed here, its right to raise equitable defenses may prove to be a hollow victory.[12] The innocent-third-party doctrine allowed courts to cut short fruitless litigation. In addition to ensuring the speedy payment of benefits as the statute requires, the doctrine operated as equitable shorthand. In other words, it described the equitable balance of certain archetypal relationships, thus saving the parties (and courts) the time and expense of balancing the equities case by case. That certainty, efficiency, and stability is now lost.

The majority instead remands for equitable balancing, but it is mum on what that proceeding will entail.

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[12] Beyond ballooning legal expenses, the possibility of rescission also injects uncertainty that will warp an insurer's risk calculus. As we have recognized before, "[T]he uncertainty associated with subjecting insurers and insureds to the whims of individual judges and their various conceptions of 'equity' would *increase* overall insurance costs because insurers would no longer be able to estimate accurately actuarial risk." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589 n 62; 702 NW2d 539 (2005).

Its silence allows it to avoid confronting the burdensome realities of its remedy. The majority states that "[e]quitable remedies are adaptive to the circumstances of each case, and an absolute approach would unduly hamper and constrain the proper functioning of such remedies." *Ante* at 411. It further points out that " '[e]quity jurisprudence molds its decrees to do justice amid all the vicissitudes and intricacies of life' and that '[e]quity allows complete justice to be done in a case by adapting its judgments to the special circumstances of the case.' " *Ante* at 411, quoting *Tkachik v Mandeville*, 487 Mich 38, 45-46; 790 NW2d 260 (2010) (alterations in original). "Complete justice" sounds good to me. But the remand order with instructions that the trial court *please ensure that complete justice is done, thank you,* doesn't paper over the problems with the remedy.

A remedy that is adaptive to the circumstances of each case requires that a court consider each case's unique circumstances. All of them. Parties will be required to litigate a new set of factual and legal disputes. Since no one factor is dispositive and any factor may be relevant, each party is incentivized to pursue every argument of conceivable merit, to fight each battle to its end, to concede nothing. And summary disposition is not a tool in a court's toolkit in disputes over equity, where any fact can be material and no rule is absolute. Thus, parties will litigate trials within a trial to demonstrate to the court that their opponent is the more blameworthy party. They will dispute whether the insurer exercised reasonable diligence to discover the insured's misrepresentations in her application before issuing a policy, whether the third party knew that the policy was obtained by the insured's fraud, and even whether the third party was driving negligently at the time of the accident; they will also litigate all possible legal avenues of relief, all

possible alternative sources of recovery, and the third party's likelihood of success on the merits in each. And I don't expect smart lawyers to stop there in pursuing their clients' goals.

It's hard to call this a win for insurers or accident victims.

B. THE INNOCENT-THIRD-PARTY DOCTRINE IS SUBSTANTIVELY SOUND

We rejected the easily-ascertainable-fraud rule in *Titan* because it was unsupported by law. The rule was unsupported by the no-fault act because the Act does not govern optional contractual coverage. And it was unsupported by substantive common-law doctrines against fraud or misrepresentation because the rule created an affirmative duty that conflicted with the legal elements of fraud. "[A]lthough the doctrines of actionable fraud, innocent misrepresentation, and silent fraud each contain separate elements, none of these doctrines requires that the party asserting fraud prove that the fraud could not have been discovered through the exercise of reasonable diligence." *Titan*, 491 Mich at 557. Although the rationale of the easily-ascertainable-fraud rule—the "clean hands" doctrine—may remain a valid consideration as a matter of equity, the insurer's lack of reasonable diligence does not affect a fraud claim as a matter of law.

The innocent-third-party doctrine, in contrast, comports with both equitable principles and the Act. It simply does not suffer from the same doctrinal weaknesses as the easily-ascertainable-fraud rule. And in the new equitable-balancing world in which a third party's innocence certainly will be weighed, and innocent third parties will be covered by one insurer or another, the shorthand serves the purposes of the Act

and saves insurers from costly litigation. I see no principled basis to reject it.

III. CONCLUSION

The no-fault act is a comprehensive statutory scheme in which the Legislature established a clear intent to mandate PIP coverage for all eligible claimants. I would hold that because the Act mandates payment of PIP benefits and explicitly provides cost-shifting and recovery remedies for insurers to invoke after the fact, the Legislature intended to abrogate common-law and equitable remedies when those remedies are in conflict with the Act. Rescission of an insurance policy to avoid the obligation to provide PIP benefits for an innocent third party contravenes the Legislature's enacted policy. Sentinel may seek to avoid its PIP obligations by invoking the remedies permitted by statute, but it may not invoke equity as an independent basis to avoid the payment of mandatory PIP benefits to an eligible claimant.

The majority's decision to permit rescission litigation when that remedy is inconsistent with the Act is a victory only for lawyers. Innocent third parties must be covered one way or another because the statute requires it and the equitable balancing cannot impose a remedy contrary to law. Although innocent third parties surely will have to endure new delays with the new litigation (and new uncertainty over the availability of MACP coverage at all if litigation commences after the one-year notice period for the MACP).

Insurers lose too. Sentinel's "win" in today's innocent-third-party rescission litigation will be an-

other insurer's loss when the MACP assigns it to pick up the tab. Lawyers, on the other hand, have lots of new litigation to pursue.

VIVIANO, J., concurred with MCCORMACK, J.

PEOPLE v ARNOLD

Docket No. 154764. Argued January 10, 2018 (Calendar No. 2). Decided July 19, 2018.

Lonnie J. Arnold was charged with aggravated indecent exposure, MCL 750.335a(2)(b), indecent exposure by a sexually delinquent person, MCL 750.335a(2)(c), and being a fourth-offense habitual offender, MCL 769.12. He was convicted of both indecent-exposure counts after a jury trial in the Monroe Circuit Court. The court, Michael A. Weipert, J., sentenced defendant to 25 to 70 years' imprisonment for indecent exposure by a sexually delinquent person, to be served concurrently with a 2-to-15-year sentence for aggravated indecent exposure. Defendant appealed, arguing that the court was required to sentence him to one day to life in prison under MCL 750.335a(2)(c). The Court of Appeals, GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ., initially held in an unpublished per curiam opinion, issued April 12, 2016 (Docket No. 325407), that, under *People v Buehler (On Remand)*, 271 Mich App 653 (2006) (*Buehler II*), rev'd 477 Mich 18 (2007) (*Buehler III*), the sentencing guidelines, rather than MCL 750.335a(2)(c), controlled sentences for defendants convicted of indecent exposure by a sexually delinquent person. Because *People v Lockridge*, 498 Mich 358 (2015), had rendered the sentencing guidelines advisory in the time since defendant had been sentenced, the panel remanded the case to the sentencing court to determine whether it would have adhered to the guidelines had it known they were only advisory. Defendant moved for reconsideration, arguing that the Court of Appeals had erred by relying on *Buehler II*. While the motion was pending, the Court of Appeals decided *People v Campbell*, 316 Mich App 279 (2016), which held that defendants convicted of indecent exposure by a sexually delinquent person must be sentenced to one day to life in prison. Consequently, the *Arnold* panel granted defendant's motion for reconsideration, vacated its previous opinion, and, in an unpublished per curiam opinion issued September 22, 2016, held that, under *Campbell*, defendant had to be sentenced to one day to life in prison. The Supreme Court granted the prosecutor's application for leave to appeal. 500 Mich 964 (2017).

In a unanimous opinion by Justice CLEMENT, the Supreme Court *held*:

MCL 750.335a(2)(c) does not require an individual convicted of being a sexually delinquent person to be given a sentence of one day to life in prison. The one-day-to-life scheme was correctly construed in *People v Kelly*, 186 Mich App 524 (1990), as an option that a trial court may consider imposing alongside the other statutory penalties available under the statute. The decisions to the contrary in *Campbell* and in *People v Butler*, 465 Mich 940 (2001), were overruled. The changes from "may be" and "shall" to "is" that 2005 PA 300 made to 1952 PA 73 were merely stylistic. The reasoning in *Buehler III*, which misconstrued the nature of the one-day-to-life sentencing option provided by MCL 750.335a and MCL 767.61a and inaccurately indicated that the 2005 PA 300 amendment of MCL 750.335a might have been meaningful, was disavowed. The Court of Appeals judgment was vacated, and the case was remanded to the Court of Appeals for reconsideration.

1. Criminal defendants charged with committing certain sex crimes can also be charged with having been a "sexually delinquent person" at the time of the offense. The sexually-delinquent-person scheme dates back to a series of statutes adopted in 1952, which were a further development of a scheme from the mid-1930s that allowed "sexual psychopaths" to be committed indefinitely to a state mental institution until their condition no longer presented a threat to public safety. The legislative history of these schemes indicated that sexual delinquency was considered a mental illness that precluded a fixed sentence and required a more flexible and less determinate sentencing framework.

2. The predicate offense for sexual-delinquency status with which defendant was charged was indecent exposure. Under MCL 750.335a(2)(a) and (b), indecent exposure is a misdemeanor punishable by not more than one year in prison, or not more than two years if aggravated circumstances are present, but when committed by a sexually delinquent person, MCL 750.335a(2)(c) provides that the offense is punishable for an indeterminate term, the minimum of which is one day and the maximum of which is life. MCL 767.61a sets forth the procedure by which an individual accused of one of the predicate offenses can also be accused of being a sexually delinquent person, stating that in any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is one day and the maximum of which is life, the indictment shall charge the offense

and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. MCL 767.61a further provides that upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges, the court may impose any punishment provided by law for such offense.

3. *Kelly* correctly construed the one-day-to-life sentence set forth in MCL 750.335a(2)(c) as not mandatory but rather an optional alternative. MCL 767.61a characterizes the one-day-to-life sentence as an alternate sentence. The dictionary indicates that the adjective "alternate" is related to "alternative," which may be used to refer to a variant or substitute in cases where no choice is involved but that this usage also coexists with the notion of "alternate" as "optional." In 1952 PA 73, the Legislature provided that indecent exposure was "punishable by imprisonment in the county jail for not more than 1 year" and, if committed by a sexually delinquent person, "may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life." The word "punishable" expresses only the potential for punishment, not its necessity, meaning that either up to a year in jail or a one-day-to-life sentence were possibilities. Further, the statute stated that, when dealing with a sexually delinquent person, the offense "may be" punishable by a one-day-to-life sentence, and "may" is ordinarily permissive. Moreover, the Legislature is capable of adopting nondiscretionary sentences and has done so for other crimes. Construing the "alternate sentence" for sexually delinquent persons as entirely optional was also more consistent with the broader law of sentencing in Michigan when the sexual-delinquency scheme was adopted, at which time, before the statutory sentencing guidelines' enactment, a judge faced with an adjudicated sexual delinquent guilty of indecent exposure could choose any legally available sentencing option the judge deemed appropriate. Construing the one-day-to-life option as an alternative that the trial court was free to consider alongside an ordinary criminal sentence of up to one year in jail was also supported by the history of the sexual-delinquency scheme. In light of these considerations, *Kelly* correctly construed the one-day-to-life alternate sentence as an option a sentencing judge could draw upon, alongside and not to the exclusion of other available options. The statement in *Butler* that there was no alternative to the mandatory indeterminate sentence of one day to life in prison when the trial court chooses to incarcerate a person convicted under MCL 750.335a and MCL 750.10a was incorrect. One day to life was not a mandatory

sentence even when the trial court chose to incarcerate the defendant, nor has any aspect of the legislative sentencing guidelines purported to make the one-day-to-life sentence mandatory.

4. *Kelly* correctly held that the sentence of one day to life was not modifiable. While 1952 PA 73 stated that indecent exposure by a sexually delinquent person may be punishable by a special indeterminate sentence, it also stated that if such a sentence was imposed, the minimum of the term shall be one day and the maximum of the term shall be life. The use of the word "shall" suggests that a trial court had no discretion to further modify the terms of the sentence, because if it chose to avail itself of the special indeterminate sentence, it had to sentence according to the special sentence's terms. Moreover, MCL 767.61a characterizes "one day to life" as an "alternate" sentence, which indicates that it ought to function in some distinct way from a term-of-years sentence. The history of the enactment of the sexual-delinquency scheme further supports this conclusion. While 1952 PA 72 has since been repealed, it was adopted contemporaneously with the sexual-delinquency scheme, and it directed the Department of Corrections on how to process persons paroled from a sentence of from one day to life. There were no instructions for how to process persons paroled from a sentence of, for example, two days to life. Construing "one day to life" as being nonmodifiable was also consistent with the history of the sexual-delinquency scheme, the purpose of which was to create a different sentencing option in which the judge gave up control over the amount of time the defendant served to experts who would assess when the defendant was well enough to rejoin society.

5. *Kelly* correctly held that the one-day-to-life sentencing scheme was an exception to the provision in MCL 769.9(2) that prohibits a court from imposing a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence, otherwise known as the ban on "life tails." MCL 769.9(2) applies only to "cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years." The phrasing "life or any term of years" is used verbatim in a variety of criminal statutes. When MCL 750.335a was adopted, it spoke of "imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life," and MCL 767.61a speaks of "an indeterminate term, the minimum of which is 1 day and the maximum of which is life." This difference in wording suggested that sexual-delinquency

cases should be removed from MCL 769.9(2). Moreover, because MCL 769.9(2) is a general indeterminate sentencing statute while the sexual-delinquency scheme is a specific, integrated scheme, the more specific statute controls. Therefore, the one-day-to-life sentence the Legislature adopted in 1952 was an alternative sentencing option that existed alongside other options, such as a life sentence or a term of years.

6. The decision in *Buehler III* was based on a flawed initial premise about the sexual-delinquency scheme, and it did not appreciate the nature of the one-day-to-life sentence and the tension between it and the sentencing guidelines. The remand order in *Buehler* directed the Court of Appeals to compare the guidelines against "the indeterminate sentence prescribed by MCL 750.335a." But MCL 750.335a did not prescribe anything; instead, it only made an option available. *Buehler* also presumed that the trial court's deviation from the sentencing guidelines should have been the end of that case's analysis. But at least until the adoption of the sentencing guidelines, no sentence on the Class A sentencing grid would even have been legal for a judge to impose on a sexually delinquent person guilty of indecent exposure. *Buehler III* did not consider whether the adoption of the legislative sentencing guidelines could make legal a sentence which would not otherwise have been legal before the guidelines were adopted. Accordingly, *Buehler III* was not a binding statement of the proper interpretation of these statutes.

7. *Campbell* was incorrectly decided. In *Campbell*, the Court of Appeals held that the conflict between the statutory language provided under MCL 750.335a(2)(c) and the sentencing guidelines, MCL 769.34, must be resolved in favor of applying MCL 750.335a(2)(c) in light of the fact that the sentencing guidelines were rendered advisory by *People v Lockridge*, 498 Mich 358 (2015), whereas the sentence provided under MCL 750.335a(2)(c) was stated in mandatory terms. First, MCL 750.335a(2)(c) is not "stated in mandatory terms." When adopted, it said that a sexually delinquent person who committed indecent exposure "may be punishable . . . for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life." After 2005 PA 300, it now says that indecent exposure by a sexually delinquent person "is punishable . . . for an indeterminate term, the minimum of which is 1 day and the maximum of which is life." This change in wording had no effect on the meaning of the statute and was merely stylistic. Further, MCL 750.335a(2)(c) still says only that the offense is punishable by a

one-day-to-life sentence, and "punishable" expresses only the possibility of punishment, not its necessity. Moreover, MCL 767.61a has not been amended, meaning that it still characterizes one day to life as an alternate sentence, not a mandatory sentence. And MCL 767.61a lays out a procedure common to all five sexual-delinquency crimes, yet each of the other four still uses the former "may be punishable" and "shall be 1 day . . . shall be life" wording. Because the sexual-delinquency alternative sentence is intended to work the same for all five offenses, if it is optional for the others, it must still be optional for indecent exposure. Second, *Campbell* ascribed inappropriate significance to *Lockridge*, which concluded that the scoring process for the legislative sentencing guidelines violated the Sixth Amendment and, as a remedy for that constitutional violation, directed that henceforth the guidelines would be only advisory. Neither identifying that problem nor crafting that remedy illuminated whether the adoption of the sentencing guidelines and the classification of indecent exposure by a sexually delinquent person as a Class A felony could make legal a sentence which would not have been legal before the adoption of the sentencing guidelines. Third, the Court of Appeals relied on the series of decisions in *Buehler*, which misconstrued the nature of the one-day-to-life sentencing option provided by MCL 750.335a and MCL 767.61a and inaccurately indicated that the 2005 PA 300 amendment to MCL 750.335a might have been meaningful. For these reasons, *Campbell* was set aside.

8. Given the significance of this decision, which embraced *Kelly*, overruled *Butler*, and disavowed *Buehler*, the case was remanded to the Court of Appeals for reconsideration in light of the revised state of the law. On remand, the Court of Appeals was directed to resolve what effect the adoption of the legislative sentencing guidelines had on the operation of the sexual-delinquency scheme as it was construed before the adoption of the guidelines.

Court of Appeals judgment vacated; case remanded to the Court of Appeals.

CRIMINAL LAW — SENTENCING — INDECENT EXPOSURE BY A SEXUALLY DELINQUENT PERSON.

MCL 750.335a(2)(c) does not require an individual convicted of being a sexually delinquent person to be given a sentence of one day to life in prison.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William Paul Nichols*, Prosecuting Attorney, and *Michael C. Brown*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Marilena David-Martin*) for defendant.

Amici Curiae:

Christian P. Margosian in support of defendant.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Laura Moody*, Chief Legal Counsel, in support of the Monroe County Prosecutor.

CLEMENT, J. In this case we determine whether individuals convicted of being "sexually delinquent persons" must be given a "1 day to life" prison sentence in accordance with MCL 750.335a(2)(c). We conclude that a "1 day to life" sentence has never been required by the statutory scheme, overruling the Court of Appeals' contrary conclusion in *People v Campbell*, 316 Mich App 279; 894 NW2d 72 (2016), and remand this case to the Court of Appeals for reconsideration in light of our conclusion.

I. FACTS AND PROCEDURAL HISTORY

Defendant Lonnie Arnold masturbated in front of an employee at the Monroe Public Library in January 2013. He was charged with aggravated indecent exposure, MCL 750.335a(2)(b), indecent exposure by a sexually delinquent person, MCL 750.335a(2)(c), and also with being a fourth-offense habitual offender, MCL 769.12. He was convicted after a jury trial on both substantive indecent-exposure counts.

At sentencing, the Department of Corrections (DOC) recommended[1] that defendant serve 225 months to 40 years in prison on the count of indecent exposure by a sexually delinquent person, to be served concurrently with 2 to 15 years on the aggravated indecent-exposure count.[2] At sentencing, defense counsel, Steven Hyder, asked that defendant be given "1 day to life":

> The law still says that a minimum term of sentence one day to life is what the sentence should be. . . . [T]his Court can sentence him to one day on any conviction, one day to life imprisonment. I don't believe that you have to follow the guidelines for the habitual offender and follow them in sentencing him to 225 months, is what the recommendation is, Judge.

The trial judge, however, rejected this request, concluding that it was not legal:

> *The Court*: I will tell you this, Mr. Hyder, if I did that one day to life, DOC would write to me and say I cannot sentence him to life. They would say you have to set a maximum because I've had that happen on other cases already.
>
> *Mr. Hyder*: Apparently, there's conflict between [the DOC] then and the statute because I'm sure this Court will review the statute in depth, and I'm sure the Court has saw what the sentence is on—on the law scope. I'm relying upon the—
>
> *The Court*: Well, I'll just tell you this. I have to give him a tail. I can't just say life because DOC will write to me and say you can't do that. There's a statute on it that says that. Okay.

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[1] Before sentencing, the DOC is required to prepare a presentence investigation report that includes "[a] specific written recommendation for disposition" and a "recommended sentence." MCL 771.14(1), (2)(c), and (2)(e)(*v*).

[2] While the maximum sentence for aggravated indecent exposure is ordinarily 2 years, MCL 750.335a(2)(b), defendant's status as a fourth-offense habitual offender increased the maximum to 15 years, MCL 769.12(1)(c).

The trial court sentenced defendant to 25 to 70 years' imprisonment on the controlling count, to be served concurrently with a 2-to-15-year sentence for aggravated indecent exposure.[3]

In the Court of Appeals, defendant argued that he had to be sentenced to "1 day to life" rather than under the sentencing guidelines. In an unpublished opinion, the panel concluded that the sentencing guidelines still controlled sentences for defendants convicted of indecent exposure by a sexually delinquent person, relying on *People v Buehler (On Remand)*, 271 Mich App 653; 723 NW2d 578 (2006) (*Buehler II*).[4] That said, during the pendency of defendant's appellate proceedings this Court had decided *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), making the sentencing guidelines advisory. The panel therefore remanded to the trial court to determine whether it would have adhered to the guidelines had it known they were only advisory.

Defendant moved for reconsideration, arguing that the Court of Appeals erred by relying on *Buehler II*. In the meantime, the Court issued its opinion in *People v Campbell*, 316 Mich App 279; 894 NW2d 72 (2016), in which it held that defendants convicted of indecent exposure by a sexually delinquent person must be sentenced to "1 day to life" under MCL 750.335a(2)(c). *Id*. at 300. Consequently, the panel in the instant case granted reconsideration and, in an unpublished opinion, held that defendant, like the defendant in *Campbell*, must be sentenced to "1 day to life." *People v*

[3] The Court of Appeals ultimately set aside defendant's sentence for aggravated indecent exposure for reasons unrelated to the questions presented in this appeal, relying on *People v Franklin*, 298 Mich App 539; 828 NW2d 61 (2012). *People v Arnold*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2016 (Docket No. 325407), p 4, vacated in part by order entered September 26, 2016.

[4] *Arnold*, unpub op at 5. This part of the opinion was later vacated.

Arnold (On Reconsideration), unpublished per curiam opinion of the Court of Appeals, issued September 22, 2016 (Docket No. 325407), p 2. We then granted leave to appeal. *People v Arnold*, 500 Mich 964 (2017).

II. STANDARD OF REVIEW

Questions of statutory interpretation are subject to de novo review. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003).

III. LEGAL BACKGROUND

A. SEXUAL DELINQUENCY IN MICHIGAN

Criminal defendants charged with committing certain sex crimes also can be charged with having been a "sexually delinquent person" at the time of the offense. In *People v Winford*, 404 Mich 400, 405-406; 273 NW2d 54 (1978), we discussed the basic contours of the sexually-delinquent-person scheme:

> The history of sexual delinquency legislation clearly indicates the Legislature's intent to create a comprehensive, unified statutory scheme. This legislation was enacted to provide an alternate sentence for certain specific sexual offenses where evidence appeared to justify a more flexible form of incarceration. . . .
>
> To this end, the Legislature introduced language into several previously existing categories of sexual offenses to allow prosecution for sexual delinquency. . . .
>
> To help implement these statutory changes, the Legislature also separately enacted a definitional provision and a procedural provision as general guidelines in sexual delinquency prosecutions.

Winford thus laid out three main components of the sexually-delinquent-person scheme: (1) predicate offenses that are eligible for "a more flexible form of

incarceration" when committed by a sexually delinquent person, (2) a definition of "sexually delinquent persons,"[5] and (3) a "procedural provision" containing charging instructions.

The predicate offense for sexual-delinquency status with which defendant in the instant case was charged is indecent exposure. The governing statute provides:

> (1) A person shall not knowingly make any open or indecent exposure of his or her person or of the person of another.
>
> (2) A person who violates subsection (1) is guilty of a crime, as follows:
>
> (a) Except as provided in subsection (b) or (c), the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.
>
> (b) If the person was fondling his or her genitals, pubic area, [or] buttocks . . . while violating subsection (1), the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
>
> (c) If the person was at the time of the violation a sexually delinquent person, the violation is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life. [MCL 750.335a.]

Thus, indecent exposure is a one-year misdemeanor, with aggravated circumstances making it a two-year

[5] While not ultimately pertinent to the outcome of this case, a "sexually delinquent person" is defined as "any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16." MCL 750.10a.

"misdemeanor,"[6] but when committed by a "sexually delinquent person," the offense "is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life." The "procedural provision," MCL 767.61a, sets out how an individual accused of one of the predicate offenses can also be accused of being a sexually delinquent person:

> In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. . . . Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense.

Defendant's sentencing illustrates the interpretive challenges posed by these statutes. Defendant did not challenge the presentence investigation report prepared by the DOC. The sentencing guidelines list indecent exposure by a sexually delinquent person as a Class A felony, MCL 777.16q, and the proposed scoring of defendant's guidelines variables placed him in cell F-III of the Class A grid, which provides for a minimum sentence of 135 to 225 months, MCL 777.62, the high end of which was then doubled to 450 months because defendant was a fourth-offense habitual offender, MCL 777.21(3)(c). Given the prospect of being forced to spend at least 11.25 years in prison before being

[6] "Misdemeanors" with two-year maximum sentences present recurring interpretive challenges. See, e.g., *People v Smith*, 423 Mich 427; 378 NW2d 384 (1985); *People v Washington*, 501 Mich 342; 916 NW2d 477 (2018).

eligible for parole, MCL 791.234(1), defendant understandably preferred the prospect of a sentence with a one-day minimum. The trial court, however, concluded that it could not give him a "life tail," arguing that the DOC would not accept such a sentence. In so stating, the court was apparently referring to MCL 769.9(2), which provides:

> In all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate sentences. *The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.* [Emphasis added.]

Consequently, the trial court imposed a sentence under the guidelines, with defendant's 25-year minimum being within the 135- to 450-month guidelines range.

Yet the trial court did not acknowledge that, in *People v Kelly*, 186 Mich App 524; 465 NW2d 569 (1990), the Court of Appeals had already addressed the relationship between a "1 day to life" sentence for sexual delinquents and MCL 769.9(2). In that case, the Court of Appeals "view[ed] the sexually delinquent sentencing scheme as a specific scheme which controls over the general indeterminate sentence act," making it "an exception to the indeterminate sentence provision . . . ." *Id*. at 531. A "1 day to life" sentence thus was said not to violate MCL 769.9(2). *Kelly* further held that the "1 day to life" option was not subject to modification. In *Kelly*, the defendant was sentenced to life imprisonment, and the Court vacated his sentence

and remanded for resentencing. It said that the defendant could be resentenced only "to imprisonment in the county jail for not more than one year, to a fine of not more than $500,[7] or to an indeterminate prison term of from one day to life." *Id*.

There have been two pertinent statutory changes since *Kelly* was decided. First, the legislative sentencing guidelines were enacted by 1998 PA 317. The sentencing guidelines treat sexual delinquency in a very different fashion from that expressed in *Kelly*. *Kelly* held, regarding incarceration, that the trial court had only the option of up to one year (now up to two years), or a sentence of "1 day to life"; by contrast, the guidelines purport[8] to *require* that defendant be given a minimum sentence of *at least* 135 months. And, as this opinion will discuss further, while this Court has indicated that indecent exposure by a sexually delinquent person is governed by the sentencing guidelines, see *People v Buehler* (*Buehler III*), 477 Mich 18, 24 n 18; 727 NW2d 127 (2007), we have yet to consider the tension between *Kelly*'s interpretation of the sexual-delinquency scheme and the guidelines' treatment of that scheme. Second, 2005 PA 300 adjusted the "1 day to life" language in MCL 750.335a, changing it from "*may be* punishable by imprisonment in the state prison for an indeterminate term, the minimum of which *shall be* 1 day and

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[7] When *Kelly* was decided, MCL 750.335a had not been amended either to include the two-year enhanced sentence for aggravated indecent exposure or to increase the fine to a maximum of $2,000. See 1952 PA 73; 2005 PA 300.

[8] We say "purport" to require because, while MCL 769.34(2) says that "the minimum sentence imposed by a court of this state . . . shall be within the appropriate sentence range under the . . . sentencing guidelines," we held in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), that the Sixth Amendment requires the guidelines to be advisory and not mandatory.

the maximum of which *shall be life*," 1952 PA 73, to "*is* punishable by imprisonment for an indeterminate term, the minimum of which *is* 1 day and the maximum of which *is* life."

The fundamental question presented by this case is how to construe the sentence of "1 day to life" provided for in MCL 750.335a and MCL 767.61a. The prosecutor effectively argues that "1 day to life" means "life or any term of years," such that a sentencing court may impose any sentence, including the one imposed here. The prosecutor's argument is based largely on the fact that the sentencing guidelines list this offense as a Class A felony. Defendant, by contrast, argues that "1 day to life" is an unmodifiable sentence to which he must be sentenced. Because of the sentencing guidelines' role in this debate, to resolve this case two determinations must be made. First, we must determine the proper interpretation of the sexual-delinquency scheme before the sentencing guidelines were adopted, which includes reviewing whether *Kelly* was rightly decided. Then, our having construed the sexual-delinquency scheme *before* the sentencing guidelines were adopted, the effect the adoption of the sentencing guidelines had on the sexual-delinquency scheme must be determined, along with an evaluation of the effect of 2005 PA 300 on the scheme.

To make sense of the "1 day to life" sentence, we must understand the characterization of it in MCL 767.61a as an "alternate sentence." As will be discussed at greater length, this word choice is open to multiple readings. As a result, and particularly in light of *Winford*'s observation that the history of the sexually-delinquent-person scheme helpfully illumi-

nates its meaning,[9] we turn to examining the history of how sexual delinquency came to be a part of Michigan law.

B. THE HISTORY OF SEXUAL DELINQUENCY IN MICHIGAN

The sexually-delinquent-person scheme dates back to a series of statutes adopted in 1952. We offered a wide-ranging discussion of the context of its adoption in *People v Helzer*, 404 Mich 410, 420-421; 273 NW2d 44 (1978), overruled on other grounds by *People v Breidenbach*, 489 Mich 1; 798 NW2d 738 (2011):

> A close examination of the legislative history of sexual delinquency demonstrates a sound basis for an alternate sentencing interpretation. At the time the concept became part of Michigan law, related statutory provisions were enacted which clearly indicate sexual delinquency was conceived as possible mental illness precluding a fixed sentence. The concept of sexual delinquency was included in the then-existing mental health code and Department of Corrections Act, which specifically provided for treatment and early release upon satisfactory review by the parole board. The intended result entailed a more flexible and less determinate sentencing framework than set terms of imprisonment. This flexible form of incarceration was meant to entirely replace the more structured and limited sentence provided upon conviction of the principal charge.
>
> . . . In sum, sexual delinquency was part of a much broader scheme of rehabilitation involving a sentence adjusted to defendant's treatment and recovery from possible mental illness. Thus the sentence for being sexually delinquent was not primarily penal. Punishment within a

[9] While we generally do not rely on legislative history, see *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003), in this case it provides useful historical information that does not bear directly on the meaning of the statutory text.

> specific limited period for the principal offense was reserved for those whose psychiatric histories, considered after conviction on the principal charge, reflected no serious tendency toward pathologically repetitive, compulsive, forceful or aggressive acts. So conceived, the sexually delinquent person concept was clearly intended to entail a more flexible, alternate form of sentencing.

But "[i]n construing a statute it is important to consider the law as it existed prior to the enactment, and particularly the mischief sought to be remedied by legislation." *Mich Dairy Co v Runnels*, 96 Mich 109, 111; 55 NW 617 (1893). The 1952 "sexually delinquent person" scheme was a response to even older "sexual psychopath" legislation, known as the "Goodrich Act," enacted in the 1930s.

"During the late 1930s, American criminal law began to address the sexual psychopath statutorily." Denno, *Life Before the Modern Sex Offender Statutes*, 92 Nw U L Rev 1317, 1344 (1998). See also Anno: *Statutes relating to sexual psychopaths*, 24 ALR2d 350, 351, § 1 (stating, in 1952, that "[s]tatutes of the type under consideration are a recent development in the law—a development occurring mainly during the last two decades"). The general intent was to "provide civil commitment, segregation, and treatment of the sexual psychopath rather than criminal punishment." *Id*. Michigan went through several rounds of implementing such a system, each of which was responsive to perceived defects in the predecessor, before arriving at our present scheme.

1. THE FIRST GOODRICH ACT

On Thursday, September 20, 1934, an 11-year-old seventh-grader in Detroit disappeared. *Girl, 11, Kidnaped, Police Fear After 2-Day Hunt Fails*, Detroit

Free Press (September 22, 1934), p 1. Her "violated body" was found in a trunk in the apartment of Merton Goodrich. *Nationwide Hunt Starts for Maniac Killer Who Lured Gallaher Girl to Her Death; Suspect Freed by Ohio's Legal Bungling*, Detroit Free Press (September 27, 1934), p 1. Goodrich had been "[t]wice committed to the Ohio State Hospital for the Criminal Insane at Lima for attacks on girls . . . ." *Id*. In response, the Michigan Legislature adopted the "Goodrich Act," 1935 PA 88, which "was the first [sexual-psychopath law] to be enacted" in the country. *Sex Offender Statutes*, 92 Nw U L Rev at 1351 n 171.[10] A legislative committee described its genesis as follows:

> The original Goodrich Act was passed, like most such legislation, in direct reaction to a particularly brutal crime. The mutilated and ravished body of a young schoolgirl named Corinne Gallagher [sic] had been found crammed into a trunk in a Detroit apartment, where a man named Merton Goodrich had lived.
>
> Goodrich, who had a criminal record and had once been committed to a mental institution after a sex offense, was arrested under a different name in New York for child-molesting, identified by his fingerprints, and returned to Michigan to stand trial.
>
> Public Act 88 of 1935, hurriedly tailored to his case in detail, provided for procedures under the Code of Criminal Procedures whereby persons appearing to be sex degenerates could, after serving prison sentences for specified sex crimes, be committed indefinitely to mental institutions. This law was hurriedly passed to take immediate effect on May 27, 1935. [Interim Report of the Special Committee on Mental Health Legislation for Criminal Cases, 5 1967 House Journal 115, 118.]

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[10] While some sources list 1937 PA 196 as the original Goodrich Act, e.g., *Sex Offender Statutes*, 92 Nw U L Rev at 1351 n 171, it is apparent that the genesis of the legislation was 1935 PA 88, see, e.g., Morris, *Mental Illness and Criminal Commitment in Michigan*, 5 U Mich J L Reform 1, 39 (1971).

The statute amended the Code of Criminal Procedure and provided that, when a defendant was convicted of certain sex-related offenses, if the defendant "shall, though not insane,[11] feeble-minded or epileptic, appear to be psychopathic, or a sex degenerate, or a sex pervert, with tendencies dangerous to public safety, the trial court before pronouncing sentence shall institute and conduct a thorough examination and investigation of such person . . . ." 1935 PA 88, § 1a. The defendant was "entitled to a jury hearing" for this investigation, but if the requisite mental condition was proved, the court was to direct that after the defendant had served his jail or prison term, the defendant was to "be removed and committed to such suitable state hospital or state institution as the court may designate in such commitment, to remain in such state hospital or state institution until said court shall adjudge that such person has ceased to be a menace to the public safety because of said mental condition." *Id*.

The 1935 statute "was the genesis of [a] further amendment and addition in 1937 . . . ." *People v Frontczak*, 286 Mich 51, 55; 281 NW 534 (1938). The new law, 1937 PA 196, "amended . . . the former act so as to provide . . . for commitment to a suitable State hospital, with suspension of sentence or holding the same in abeyance," *Frontczak*, 286 Mich at 55, with annual reviews of the defendant's condition (subject to

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[11] "The sexual psychopath statutes . . . regarded sexual psychopaths as neither normal nor legally insane . . . ." *Sex Offender Statutes*, 92 Nw U L Rev at 1352. See also Comment, *Validity of Sex Offender Acts*, 37 Mich L Rev 613, 617 (1939) ("Today psychiatrists recognize a large intermediate group of psychopathic personalities, persons neither strictly sane nor insane by conventional standards. . . . Particularly, most of those convicted of sex crimes must be regarded not as insane, but as psychopathic personalities."); Anno, 24 ALR2d at 351, § 1 (stating that sexual-psychopath laws "recognize that the sexual psychopath is neither normal nor legally insane . . . .").

a jury trial) until such time as the trial court concluded that the defendant "ha[d] ceased to be a menace to the public safety because of such tendencies and mental condition," 1937 PA 196, § 1a, at which point the defendant would receive credit against his sentence for the time spent in treatment. The 1937 law also added a process by which defendants who were already serving time in prison could be evaluated. When an existing prisoner "appear[ed] to be a sex degenerate or a sex pervert, or appear[ed] to be suffering from a mental disorder characterized by marked sexual deviation, with tendencies dangerous to public safety, the commissioner of pardons and paroles" was authorized to "file his petition [making such allegations] in the circuit court of the county where such person may be confined," with the defendant to receive a local jury trial as to his mental state. 1937 PA 196, § 1b.

We held in *Frontczak* that 1937 PA 196, § 1b, was unconstitutional. The defendant in *Frontczak* had been convicted a few months before 1937 PA 196 took effect and was serving time at the prison in Ionia. A petition was filed against him and tried in Ionia circuit court, and he was committed under the act. We explained:

> This enactment is more than an inquest relative to the mental condition of a prisoner because the company in which it is found is a part of criminal procedure following conviction of a criminal offense and after sentence and during confinement and, in the instance at bar, removed from the jurisdiction of the trial court and domicile of the prisoner and vested in another court, at a point removed from the prisoner's former domicile, and where he is to be tried by a jury in a vicinage where the criminal law has him in confinement and where he committed no crime. . . .
>
> Section 1b . . . is void, as subjecting an accused to two trials and convictions in different courts for a single statutory crime, with valid sentence interrupted by supplemen-

> tary proceeding in another court, with confinement in a non-penal institution and with possible resumption of imprisonment under the original sentence. If not for a single offense, then one trial is for a penalized overt act and the other for having a mental disorder, characterized by marked "sexual deviation." For an overt act offense the accused has a right to trial by jury of the vicinage, while under this act, for no statutory offense, he is to be tried by a jury of another vicinage, possibly far removed from his former domicile and friends and, if penniless and friendless, and the procedure is not under the criminal code he cannot obtain counsel or have witnesses at public expense. If the procedure is not under the criminal code, then the enactment is no amendment or addition to that code and a mere estray and a nullity. [*Frontczak*, 286 Mich at 57-58.]

We later held in *In re Boulanger*, 295 Mich 152; 294 NW 130 (1940), that 1935 PA 88, § 1a, as amended by 1937 PA 196, § 1a, was similarly unconstitutional.

2. THE SECOND GOODRICH ACT

In response to *Frontczak*, the Legislature adopted 1939 PA 165,[12] and it repealed the first Goodrich Act in 1939 PA 199.[13] The new law was pointedly not made

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[12] See Interim Report, 5 1967 House Journal at 118 ("The present Goodrich Act, Public Act 165 of 1939, was perhaps less of a reaction to a shocking crime than a reaction to an adverse Supreme Court decision.").

[13] There was actually a second piece of legislation in the first Goodrich Act: 1935 PA 87, which created a process by which proceedings before a justice of the peace for sex crimes could be referred to the circuit court for the same procedures as in 1935 PA 88. Our *Frontczak* decision and 1939 PA 199 left it "render[ed] ineffective," OAG, 1941-1942, No. 23908, p 623, at 623 (June 11, 1942), although it was not until 1990 PA 219 that the Legislature repealed it as a housecleaning measure on the advice of the Michigan Law Revision Commission, see House Legislative Analysis, HB 4754 (January 7, 1991); Michigan Law Revision Commission, 10th Annual Report (1975), pp 123-124.

part of the Code of Criminal Procedure,[14] but was instead an independent statutory scheme. It defined a "criminal sexual psychopathic person" as "[a]ny person who is suffering from a mental disorder and is not insane or feeble-minded, which mental disorder has existed for a period of not less than 1 year and is coupled with criminal propensities to the commission of sex offenses." 1939 PA 165, § 1. The procedure was no longer confined to enumerated sex crimes, but instead was available in any criminal case. The prosecuting attorney was to allege that the defendant was a "criminal sexual psychopathic person." If the court determined that the defendant was a "criminal sexual psychopathic person," it was to "commit such person to the state hospital commission to be confined in an appropriate state institution under the jurisdiction of either the state hospital commission or the department of corrections until such person shall have fully and permanently recovered from such psychopathy," as determined by petitioning the circuit court and after a jury trial. 1939 PA 165, §§ 5 and 7; see *In re Rowan*, 305 Mich 231; 9 NW2d 528 (1943) (holding that an individual committed under the statute was entitled to a jury trial). A person found to be a criminal sexual psychopathic person could not later "be tried upon the offense with which he originally stood charged in the committing court at the time of the filing of the original petition." 1939 PA 165, § 8.

The constitutionality of the second Goodrich Act was upheld in *People v Chapman*, 301 Mich 584; 4 NW2d 18

[14] See Report of the Senate Interim Study Committee Pertaining to Criminal Sexual Deviates, 2 1958 Senate Journal 1019, 1021 ("Following the Frontczak decision, . . . the Legislature at its next session in 1939 enacted P.A. No. 165, not as a curative amendment but as an independent Act . . . .").

(1942). We distinguished the 1939 legislation from that which preceded it by noting that the earlier legislation was

> placed in the criminal-code chapter relating to judgments and sentences in criminal cases. The present statute is not contained in either the code of criminal procedure or the penal code. It makes sex deviators subject to restraint because of their acts and condition, and not because of conviction and sentence for a criminal offense. It does not extend or impose an added or different sentence under the guise of hospitalization. The procedure under this statute resembles a statutory inquest for the commitment of an insane person accused of a felony. Proceedings under the present statute are not criminal in nature and, therefore, are not circumscribed by the constitutional and statutory limitations surrounding a person accused of, or tried for, a crime. [*Id*. at 602-603 (citation omitted).]

See also *People v Piasecki*, 333 Mich 122, 142; 52 NW2d 626 (1952) (noting that proceedings to indefinitely commit a criminal sexual psychopathic person were "wholly separate and apart from proceedings under the criminal law of the State").

3. SEXUAL DELINQUENCY

The actual sexual-delinquency scheme we interpret in this case was, in turn, adopted because of dissatisfaction with the second Goodrich Act. In 1949, then-Governor G. Mennen Williams appointed a committee, which named itself the "Governor's Study Commission on the Deviated Criminal Sex Offender." It "felt that the so-called 'Goodrich Act' was merely stop-gap legislation passed hastily at the time of some sex murders in the 1930s," and recommended a variety of amendments to the scheme, only some of which were adopted as 1950 (Ex Sess) PA 25. See Report of the Governor's Study Commission on the Deviated Criminal Sex Of-

fender (1951), p 120. Yet the Commission "d[id] not consider even [that] amended Act to be the ultimate legislation . . . ." *Id*. at 120. The Commission faulted the Goodrich Act for being "dependent upon a finding of a specific type of mental disorder which must be defined in the legislation," which was "particularly vexatious because it represent[ed] an attempt to write into law a medically determined condition." *Id*. at 129. Moreover, the Commission thought it was a problem under the Goodrich Act "that some designated person—the prosecuting attorney, attorney general, defense counsel, or other person with knowledge of the facts—must prepare a special petition in order to start the commitment proceedings." *Id*. at 130. The Commission preferred that "[t]he option of indefinite commitment with treatment present[] itself automatically upon conviction, so that intermediate determinations by third parties are avoided." *Id*. at 131.

The Commission "ma[de] a careful study of the statutory treatment of the sex deviation problem by other States." *Id*. at 121. It ultimately "recommend[ed] the general theory recently developed by New York as the basic reform." *Id*. at 124. The centerpiece of this reform was making "[c]ertain more serious sex offenses . . . punishable by either a sentence of imprisonment for a fixed minimum and maximum number of years or an indeterminate sentence of imprisonment for one day to life." *Id*. The repeated references to "one day to life" in the report make clear that other sentences (such as "two days to life" or some such) were not intended. See, e.g., *id*. at 134 ("[T]he Committee recommends that the alternative indeterminate sentence of one day to life be applied to several sex offenses which were not included within the program of the State of New York."); *id*. at 136 ("The Committee re-emphasizes that the alternative indeterminate sen-

tence of one day to life is not designed as a method of punishment. It is merely a technical method of obtaining indefinite commitments so that the convicted sex offender may be segregated as long as necessary to protect the public and to provide for rehabilitation for his own protection and well-being."). See also Thurber, *A Twentieth Century Program for the Sex Offender Problem*, 15 U Det L J 1, 8 (1951) ("Under the Commission plan an indeterminate sentence of one day to life (the wording of the sentence as imposed would be 'which shall have a minimum of one day and a maximum of life') would be added to the options . . . ."). The Commission also "believe[d] that the adoption of this program for the disposition of the convicted sex offender, in conjunction with other recommendations of the Committee, would eliminate the need for Michigan's 'Goodrich Act.' " Governor's Commission Report, p 141.

In the end, the Legislature adopted a revised version of the program recommended by the Governor's Study Commission, which became our current sexual-delinquency regime. Certain recommendations were rejected.[15] For example, the "1 day to life" option is available only for "sexually delinquent persons" as defined in MCL 750.10a, leaving in place some of the definitional issues that came with characterizing a defendant as a "criminal sexual psychopathic person." The charging procedure in MCL 767.61a "provide[s] for a double charge for an offense committed by a sexually delinquent person," requiring "[t]he indictment [to] charge (1) the offense [and] (2) that at the time the offender was a sexually delinquent person," Interim

[15] One legislative report said "[i]t emerged from the legislative hopper, amended so as to be unworkable . . . ." Interim Report, 2 1958 Senate Journal at 1023.

Report, 2 1958 Senate Journal at 1023, leaving in place the need for a special allegation to begin commitment proceedings. Moreover, notwithstanding the Commission's recommendation, the Legislature did not repeal the Goodrich Act, "because the statute was regarded as a useful prosecution tool for forcing the confinement and treatment of certain varieties of sex offenders." Interim Report, 5 1967 House Journal at 119. It is apparent, in other words, that the Commission's recommendations do not speak for the Legislature's ultimate legislative action.

That said, it is equally clear that the Legislature *did* take some action consistent with the Commission's recommendations. First and foremost, the Michigan Penal Code was amended to include the "1 day to life" sentencing option for several crimes, including indecent exposure:

> Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 1 year, or by a fine of not more than $500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life . . . . [1952 PA 73.]

Moreover, the statute governing the Department of Corrections was amended to provide for how to handle individuals given this alternate sentence:

> Sec. 33a. As soon as possible after a commitment and at intervals not to exceed 6 months thereafter during the term of each prisoner sentenced to an indeterminate term of a minimum of 1 day and a maximum of life, the parole board shall cause to be brought before it, with respect to such prisoner, a copy of the pre-sentence probation re-

> port . . . to assist the board in its determination of the granting or refusal of parole at that time . . . .
>
> Sec. 36a. The following shall apply to those persons paroled from a sentence of from 1 day to life . . . .
>
> Sec. 40a. Whenever in the opinion of the parole board, upon consideration of the record and condition of a prisoner sentenced to an indeterminate term of a minimum of 1 day and a maximum of life, . . . it shall appear that such prisoner is no longer a sexually delinquent person, the board may enter an order of final discharge . . . .
>
> Sec. 40b. Upon the failure of the parole board to grant to any prisoner, not on parole, sentenced to an indeterminate term of a minimum of 1 day and a maximum of life, an unconditional discharge, but in no case sooner than 3 calendar years after commitment, nor more often than every 5 calendar years thereafter, said prisoner, by himself or through counsel, shall have the right to petition to the sentencing court for a hearing or trial. . . . If the court or the jury finds by a preponderance of the evidence that such prisoner is no longer a sexually delinquent person, the court shall order his unconditional discharge; otherwise, such prisoner shall forthwith be returned to the custody of the state department of corrections. [1952 PA 72.]

Not long after this scheme was adopted, the Legislature began chipping away at it. The provisions regarding how the Department of Corrections was to specially process individuals given "1 day to life" sentences were not retained when the Corrections Code was adopted. See 1953 PA 232. The Goodrich Act itself was repealed. 1968 PA 143. The Legislature also withdrew the ability to sentence defendants to "1 day to life" for several crimes. See 1974 PA 266. Thus, "sexual delinquency is now limited to five specific criminal provisions, three of which arise from the same criminal conduct," *Helzer*, 404 Mich at 422—the five offenses being (1) sodomy, MCL 750.158, (2) indecent exposure,

and (3) gross indecency between (a) two males, MCL 750.338, (b) two females, MCL 750.338a, or (c) between a male and a female, MCL 750.338b.

IV. ANALYSIS

A. SEXUAL-DELINQUENCY SENTENCING BEFORE THE GUIDELINES

As noted, the threshold question we must address is what the proper interpretation of the sexual-delinquency scheme was before the sentencing guidelines were adopted in 1998. This, in turn, has three components: first, whether the "1 day to life" sentence was optional or mandatory for defendants who qualified for it; second, whether the "1 day to life" sentence was a range within which a judge could sentence and thus could be modified, or whether it was nonmodifiable; and third, what effect the ban in MCL 769.9(2) on so-called "life tails" has on the "1 day to life" scheme.

1. OPTIONAL VS. MANDATORY

As has been noted, the basic functioning of the sexual-delinquency scheme is that certain sex offenses are identified as being eligible for different treatment if the defendant is accused and convicted of having been a "sexually delinquent person" at the time of the offense. The procedure that is common to all these offenses is laid out in MCL 767.61a, which characterizes the "1 day to life" sentence as "an alternate sentence." The question we confront is whether this is a *mandatory* alternative or an *optional* alternative. We conclude that the best reading is to construe it as an *optional* alternative.

The adjective "alternate" is defined as "[s]erving or used in place of another; substitute[.]" *American Heritage Dictionary of the English Language* (5th ed), def 3.

But the dictionary offers a cross-reference to the usage note for "alternative," which notes that "[a]s an adjective, *alternative* can mean 'allowing or requiring a choice between two or more things,' " but it "may also refer to a variant or substitute in cases where no choice is involved . . . ." Thus, when road construction is going to make an arterial highway unavailable, authorities advise motorists to "seek alternate routes," because the usual route can no longer be chosen. This usage coexists with the notion of "alternate" as optional, such as deciding which of two alternate routes will get the motorist to their destination faster. Which meaning is intended here?

We believe the better reading of the scheme construes the "alternate sentence" as optional. Consider that, in 1952 PA 73, the Legislature provided that indecent exposure was "punishable by imprisonment in the county jail for not more than 1 year" and, if committed by a sexually delinquent person, "may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life[.]" The word "punishable" is defined as "liable to punishment; capable of being punished." *Oxford English Dictionary* (2d ed).[16] The word expresses only the *potential* for punishment, not its necessity, meaning that either up to a year in jail or a "1 day to life" sentence were *possibilities*. This conclusion is further strengthened by the fact that the statute said that, when dealing with a sexually delinquent person, the offense "may be" punishable by a "1 day to life" sentence. It is well established that the use of the word "may" is ordinarily permissive.

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[16] See also *Black's Law Dictionary* (4th ed), which was published in 1951 and defined "punishable" as "[d]eserving of or capable or liable to punishment; capable of being punished by law or right."

See *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982) ("[C]ourts should give the ordinary and accepted meaning to . . . the permissive word 'may' . . . ."); see also *Allen v Carpenter*, 15 Mich 25, 43-44 (1866) ("The provision . . . is permissive in its form, and only declares that all such tenancies *may* be thus terminated[.]"); *Largy v Holland*, Blume Unrep Op 129, 132 (Mich, 1842) ("The language . . . of the 10th [statutory section is] *permissive*, 'The award *may* be returned . . . .' "). Moreover, the Legislature is certainly capable of adopting nondiscretionary sentences. See, e.g., MCL 750.227b(1) ("A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . shall be punished by imprisonment for 2 years."). Even if, as a matter of general English usage, "alternate" can in some contexts refer to a mandatory alternative, we do not conclude that the Legislature was using it in this mandatory fashion here when it deliberately chose not to use the sort of mandatory language it ordinarily uses when it wants to preclude other sentencing options.

Construing the "alternate sentence" for sexually delinquent persons as entirely optional is also more consistent with the broader law of sentencing in Michigan when the sexual-delinquency scheme was adopted. At that time, "appellate review of sentences . . . included [only] the procedural consideration of how the defendant was sentenced as well as a consideration of whether the substance of the sentence was statutorily or constitutionally permissible." *People v Coles*, 417 Mich 523, 532; 339 NW2d 440 (1983). See also *Lockridge*, 498 Mich at 415 n 8 (MARKMAN, J., dissenting) ("Michigan initially had a purely indeterminate sentencing scheme, in which the judge possessed unfettered judgment to sentence a defendant anywhere be-

tween no jail time and imprisonment in the amount of the statutory maximum."). It was not until Administrative Order No. 1983-3, 417 Mich cxxi (1983), that we went so far as to "invite[], but not require[]," trial judges to use sentencing guidelines. And when we did make them mandatory, Administrative Order No. 1984-1, 418 Mich lxxx (1984); Administrative Order No. 1985-2, 420 Mich lxii (1985), indecent exposure by a sexually delinquent person was not included in the scheme, Michigan Sentencing Guidelines (1988), p 13. In other words, before the statutory sentencing guidelines' enactment, a judge faced with an adjudicated sexual delinquent guilty of indecent exposure could choose any legally available sentencing option the judge deemed appropriate.

Construing the "1 day to life" option as an alternative, which the trial court was free to consider alongside an ordinary criminal sentence of up to one year in jail, is also supported by the history of the sexual-delinquency scheme. As the Governor's Study Commission said:

> It is also important to state the possible alternatives which will be available to the court upon conviction of a sex offender. The alternative one day to life sentence would be but one additional method of disposition in a particular case. At present, the court may sentence the convicted sex offender to a prison term with a fixed minimum and maximum number of years; the court may suspend sentence; it may impose a fine; or it may place the offender on probation. These present alternatives would continue. In addition, the court would have the power under the new sentence to protect the community adequately and to provide treatment and rehabilitation for the offender. [Governor's Commission Report, p 137.]

See also *Twentieth Century Program*, 15 U Det L J at 8 (stating that the indeterminate sentence option "would be added to the options already available to courts of

record when the latter are confronted with a convicted or confessed sex offender" even while "[a]ll present options remain unimpaired"); Bennett, *Proposed Additional Means of Dealing with Sex Offenders*, 30 Mich St B J 28, 32 (1951) (stating that the scheme would provide for the "[a]ddition of an alternative sentence of one day to life . . . *in the discretion of the court*").

In light of all of these considerations—the text of the statutory scheme, the Legislature's usual pattern in clearly identifying mandatory sentences, the relation this scheme would have had to the overarching law of sentencing at the time the scheme was adopted, and the history of the scheme—we conclude that *Kelly* correctly construed the "1 day to life" alternate sentence as an *option* a sentencing judge could draw upon, alongside and not to the exclusion of other available options.

2. MODIFIABLE VS. NONMODIFIABLE

Having concluded that *Kelly* correctly construed "1 day to life" as an option, we must also determine what the parameters of that option were. The "1 day to life" option was said in MCL 767.61a to be punishable by an indeterminate term, "the minimum of which is 1 day and the maximum of which is life . . . ." But did this mean that the minimum *the judge could choose from* was 1 day, and the maximum *the judge could choose from* was life? Or did it mean that, if the judge chose to sentence under the "1 day to life" scheme, the sentence could be nothing other than precisely "1 day to life"?

We believe that the better reading of the scheme is that "1 day to life" was not modifiable. Consider that 1952 PA 73 said that, while indecent exposure by a sexually delinquent person *may* be punishable by a

special indeterminate sentence, it also said that if such a sentence was imposed, "the minimum of [the term] shall be 1 day and the maximum of [the term] shall be life." The use of the word "shall" suggests that a trial court had no discretion to further modify the terms of the sentence, because if it chose to avail itself of the special indeterminate sentence, it had to sentence according to the special sentence's terms. See *Smith v Sch Dist No 6*, 241 Mich 366, 369; 217 NW 15 (1928) ("By the use of the word 'may' in the first section, the Legislature authorized and permitted the board of education to come under the provisions of the act if it so desired. By the use of the word 'shall' in the other portions of the act it was the legislative intent that if the board of education adopted the act, then such other provisions became mandatory and the board of education became bound to follow and enforce them. In other words, districts 'may' come under the provisions of the act. If they do its provisions 'shall' be followed."). Moreover, MCL 767.61a characterized "1 day to life" as an "alternate" sentence, which indicates that it ought to function in some distinct way. Consider that MCL 769.12(1)(c) allows a fourth-offense habitual offender who has committed a less-than-5-year felony to be sentenced to a maximum of up to 15 years; would we characterize the up-to-15-year sentence as an "alternate sentence" to the ordinary sentence? Certainly not, because it works no differently, but is simply more of the same.

Again, the history of the enactment of the sexual-delinquency scheme further supports this conclusion. While 1952 PA 72 has since been repealed, it was adopted contemporaneously with the sexual-delinquency scheme, and it directed the DOC on how to process "persons paroled from a sentence of from 1 day to life[.]" 1952 PA 72, § 36a. There are no instructions

for how to process persons paroled from a sentence of, for example, *2* days to life. This Court's statements in *Helzer* further confirm the nonmodifiable nature of the "1 day to life" option. There, the Court of Appeals had "found sexual delinquency to be . . . simply a penalty enhancement provision related to the principal gross indecency charge," an interpretation we rejected because the scheme "reflects legislative intent to construe sexual delinquency as a separate, alternate form of sentencing." *Helzer*, 404 Mich at 419.

Construing "1 day to life" as being nonmodifiable is also consistent with the history of the sexual-delinquency scheme, which was clearly intended to be therapeutic and open-ended. It is apparent that the sexual-delinquency scheme was adopted as a further refinement of the preexisting "Goodrich Act," and it viewed sexual delinquency as a form of mental illness for which an offender would receive treatment. See, e.g., *Twentieth Century Program*, 15 U Det L J at 8 ("The heart of the Commission program is the introduction of a true indeterminate sentence in the disposition of offenders convicted of sex crimes" which was "*already approximated in the indeterminate commitments had under Michigan's present sex-psychop*[*a*]*th law*.") (emphasis added). The purpose of the scheme was to create a *different* sentencing option, one in which the judge *gave up* control over the amount of time the defendant served to experts who would assess when the defendant was well enough to rejoin society.

Once again, in light of all of these considerations—the text of the scheme, its history as an evolution of the older Goodrich Act, and its apparent purpose—we conclude that *Kelly* correctly interpreted the "1 day to life" sentencing option as nonmodifiable.

3. "1 DAY TO LIFE" AND MCL 769.9(2)

Finally, we agree with *Kelly* that the "1 day to life" sentencing scheme is an exception to the indeterminate sentencing statute's ban on so-called "life tails," MCL 769.9(2). First, textually, MCL 769.9(2) applies only to "cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years . . . ." The phrasing "life or any term of years" is used verbatim in a variety of statutes. See, e.g., MCL 750.72(3) (stating that first-degree arson is a felony "punishable by imprisonment for life or any term of years"); MCL 750.85(1) (same for torture); MCL 750.136b(2) (same for first-degree child abuse). When MCL 750.335a was adopted, it spoke of "imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life," 1952 PA 73, and MCL 767.61a speaks of "an indeterminate term, the minimum of which is 1 day and the maximum of which is life . . . ." On its own, this difference in wording may be enough to remove sexual-delinquency cases from MCL 769.9(2). Moreover, we agree with *Kelly* that because MCL 769.9(2) is a general indeterminate sentencing statute, while the sexual-delinquency scheme is a specific, integrated scheme, the more specific statute controls. "When a general intention is expressed, and also a particular intention, which is incompatible with the general one, the particular intention shall be considered an exception to the general one." *Attorney General ex rel Owen v Joyce*, 233 Mich 619, 624; 207 NW 863 (1926) (quotation marks and citation omitted).

In short, we construe the "1 day to life" sentence that the Legislature adopted in 1952 as being an alternative sentencing option that existed *alongside* other options, such as a life sentence or a term of years.

Much as "[t]he sentence concepts 'life' and 'any term of years' are mutually exclusive and a sentencing judge may (in the appropriate case) opt for either but not both," *People v Johnson*, 421 Mich 494, 498; 364 NW2d 654 (1984), so "1 day to life" was a mutually exclusive concept that a sentencing judge was free to opt for to the exclusion of a life- or term-of-years sentence.

B. RAMIFICATIONS OF AFFIRMING *KELLY*

There are a few consequences for other areas of our caselaw that flow from our conclusion that *Kelly* correctly construed "1 day to life" as a nonmandatory option that a trial court could draw upon should it choose to exercise its discretion to do so. First, in *People v Butler*, 465 Mich 940, 941 (2001), we said that "there is no alternative to the mandatory indeterminate sentence of one day to life in prison where the trial court chooses to incarcerate a person convicted under MCL 750.335a and MCL 750.10a." This was incorrect. As we have held, "1 day to life" was not a mandatory sentence even when the trial court chose to incarcerate the defendant.[17] Nor has any aspect of the legislative sentencing guidelines purported to make "1 day to life" mandatory.

Second, we must revisit our decision in *Buehler III*, which we now recognize was based on a flawed initial premise about the sexual-delinquency scheme. In that case, the defendant was convicted of indecent exposure

[17] In similar fashion, in *People v Murphy*, 203 Mich App 738, 745; 513 NW2d 451 (1994), the Court of Appeals said that the sexually-delinquent-person scheme's "alternate sentencing provisions . . . instructed the judge that the Legislature considered one day to life to be the correct sentence for the principal offense." Insofar as this suggested that "1 day to life" was the *mandatory* sentence the trial court was obliged to impose, it was wrong.

by a sexually delinquent person and had a minimum sentencing range of 42 to 70 months' imprisonment under the guidelines. The trial court, however, departed from that recommendation and imposed a sentence of 3 years' probation. The prosecutor initially moved for resentencing, arguing that the trial court was obliged to sentence the defendant to "1 day to life." The trial court denied the motion. On appeal, the prosecutor shifted to arguing that the trial court had not articulated adequate reasons to depart from the guidelines. The Court of Appeals initially reasoned much as we have in this opinion. See *People v Buehler* (*Buehler I*), 268 Mich App 475; 710 NW2d 55 (2005). It concluded that, "regardless of whether the term of any indeterminate prison sentence imposed by a trial court is controlled by the statutory sentencing guidelines or the more exacting language of MCL 750.335a, the plain, unambiguous language of MCL 750.335a indicates that such a sentence is merely an alternative to the determinate jail sentence or fine generally available for a conviction under MCL 750.335a." *Id*. at 480. The panel went on to conclude that probation is an additional punishment available to the trial court under the language in MCL 767.61a giving the trial court the ability to "impose any punishment provided by law," and affirmed the trial court's decision. *Id*. at 482-483.

On the prosecutor's appeal to this Court, we vacated the decision of the Court of Appeals and remanded for consideration of "whether any term of imprisonment that may be imposed by the circuit court is controlled by the legislative sentencing guidelines or by the indeterminate sentence prescribed by MCL 750.335a," as well as whether the trial court offered adequate justification to depart from the guidelines. *People v Buehler*, 474 Mich 1081 (2006). On remand, the Court of Appeals concluded that the trial court had not

articulated adequate reasons to depart from the guidelines. *Buehler II*, 271 Mich App at 656. As to whether MCL 750.335a or the statutory guidelines controlled, the Court of Appeals felt that MCL 750.335a "plainly require[d] that any term of imprisonment imposed for a conviction of indecent exposure as a sexually delinquent person be for a period of one day to life." *Id*. at 657. Because the guidelines "require[d] imposition of a sentence consistent with a minimum guideline range that will vary with the circumstances surrounding each particular offense and offender, and MCL 750.335a expressly require[d] a definitive sentence of one day to life, there c[ould] be no construction that wholly avoid[ed] conflict between these two statutes." *Id*. at 658. The panel concluded that the guidelines, as the more recently enacted legislation, should control. However, the Court of Appeals reiterated that probation was a lawful sentence that the trial court could impose under MCL 767.61a and reaffirmed the trial court. The panel noted that it expressed no opinion on the effect of 2005 PA 300 on the case because it was adopted after the defendant's criminal conduct. *Buehler II*, 271 Mich App at 654 n 1, 659 n 4.

On appeal again to this Court, we reversed the Court of Appeals decision. *Buehler III*, 477 Mich at 28. We observed that indecent exposure by a sexually delinquent person was a listed felony in the guidelines, and we concluded that the trial court was obliged to impose a sentence within the appropriate guidelines range in the absence of a substantial and compelling reason to depart. We "agree[d] with the Court of Appeals that the trial court in th[at] case failed to state substantial and compelling reasons for a departure," *Buehler III*, 477 Mich at 24, meaning that the "defendant's sentence [was] invalid under the sentencing

guidelines," *id*., and we faulted the Court of Appeals for "not end[ing] its analysis at that point," *id*. at 25.

> Both panels held that courts may avoid the guidelines for any probationable felony. The probation statute and the sentencing guidelines must be construed together because "statutes that relate to the same subject or that share a common purpose are *in par*[*i*] *materia* and must be read together as one." When there is a conflict between statutes that are read *in par*[*i*] *materia*, the more recent and more specific statute controls over the older and more general statute. Significantly, the panel in *Buehler II* found that MCL 750.335a and the sentencing guidelines were *in par*[*i*] *materia* and that the more recently enacted guidelines control. Unfortunately, neither panel applied the same analysis to the probation statute and the sentencing guidelines. The sentencing guidelines were enacted after the probation statute, and they are more specific in that they provide a detailed and mandatory procedure for sentencing involving all enumerated crimes. Therefore, the sentencing guidelines control for a crime that could be punished under the guidelines or with probation. [*Id*. at 26-27.]

Because probation was a departure from the guidelines range and the trial court had not articulated substantial and compelling reasons to depart from the range, we reversed the Court of Appeals and remanded to the trial court for resentencing. *Id*. at 28. We also stated that we had no opinion of the effect of 2005 PA 300 on the case. *Id*. at 24 n 18.

Our close analysis of the sexual-delinquency scheme in this case reveals that *Buehler* did not appreciate the nature of the "1 day to life" sentence and the tension between it and the sentencing guidelines. For example, in our remand order to the Court of Appeals in *Buehler*, we directed the Court to compare the guidelines against "the indeterminate sentence *prescribed by* MCL 750.335a." *Buehler*, 474 Mich at 1081. But our

conclusion here that *Kelly* was rightly decided indicates that MCL 750.335a did not *prescribe* anything; instead, it only made an *option* available. *Buehler* also presumed that the trial court's deviation from the sentencing guidelines should have been the end of that case's analysis. But at least until the adoption of the sentencing guidelines, no sentence on the Class A sentencing grid would even have been *legal* for a judge to impose on a sexually delinquent person who was found guilty of indecent exposure. *Buehler* did not consider whether the adoption of the legislative sentencing guidelines could make legal a sentence that would not otherwise have been legal before the guidelines were adopted.

Of course, in some respects *Buehler III*'s holding is now irrelevant, because trial courts need not express substantial and compelling reasons to depart downward after *Lockridge*. But here, the Court of Appeals relied on *Buehler III*'s treatment of the sexual-delinquency scheme alongside the sentencing guidelines to reach its conclusion. We no longer regard *Buehler III* as a binding statement of the proper interpretation of these statutes.

V. APPLICATION

Having concluded that the sexual-delinquency scheme created only an *optional* "1 day to life" sentence that trial courts were free to select alongside the other sentencing remedies available to them, we now turn to the case at hand. The panel here simply relied on *Campbell*, which it was bound to do, MCR 7.215(J)(1), so we turn our attention to *Campbell*.

In *Campbell*, the defendant was convicted of six counts of indecent exposure by a sexually delinquent person. The trial court sentenced him to 35 to 82 years

in prison. *Campbell*, 316 Mich App at 281. On appeal, the defendant argued "that the trial court did not have the discretion to determine a minimum and maximum sentence under the sentencing guidelines" because, in light of *Lockridge*'s holding "that the sentencing guidelines are advisory, . . . trial courts are required to sentence a person convicted of indecent exposure as a sexually delinquent person to serve one day to life in prison." *Campbell*, 316 Mich App at 297. The panel characterized the issue as "whether MCL 750.335a or the statutory sentencing guidelines control[led] Campbell's sentence . . . ." *Id*. at 298. It noted that the Court of Appeals and this Court had stated in *Buehler II* and *Buehler III* that they had no opinion on the effect of 2005 PA 300. *Id*. The Court then said:

> Campbell argues that the change in statutory language [due to 2005 PA 300] from "may be punishable" to "is punishable" indicates that the Legislature intended that the indeterminate sentence of one day to life be a mandatory sentence, notwithstanding the sentencing guidelines.
>
> We agree that the conflict between the statutory language provided under MCL 750.335a(2)(c) and the sentencing guidelines, MCL 769.34, must now be resolved in favor of applying MCL 750.335a(2)(c). Our Supreme Court has determined that the sentencing guidelines were unconstitutional to the extent that the guidelines required trial courts to determine a defendant's minimum sentence on the basis of facts "beyond those admitted by the defendant or found by the jury beyond a reasonable doubt . . . ." *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015). Although the Supreme Court determined that the guidelines should still be scored by trial courts, it nevertheless held that trial courts are no longer required to sentence a defendant to a minimum sentence within the range provided by the guidelines—that is, the guidelines are now merely advisory. *Id*. at 365. By contrast, the sentence provided under MCL 750.335a(2)(c) is stated in mandatory terms. Consequently, after the deci-

> sion in *Lockridge*, trial courts must sentence a defendant convicted of indecent exposure as a sexually delinquent person consistently with the requirements of MCL 750.335a(2)(c). [*Id*. at 299-300.]

In light of our conclusions in this case, *Campbell*'s reasoning cannot stand. First, MCL 750.335a(2)(c) is not "stated in mandatory terms." When adopted, it said that a sexually delinquent person who committed indecent exposure "*may be* punishable . . . for an indeterminate term, the minimum of which *shall be* 1 day and the maximum of which *shall be* life." 1952 PA 73. After 2005 PA 300, it now says that indecent exposure by a sexually delinquent person "*is* punishable . . . for an indeterminate term, the minimum of which *is* 1 day and the maximum of which *is* life." In our view, this change in wording has no effect on the meaning of the statute and is merely stylistic. While "a change in the language of a prior statute presumably connotes a change in meaning," "[t]his presumption does not apply to stylistic or nonsubstantive changes." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 256. Cf. *id*. at 114 ("[T]here has been a movement in recent years to rewrite the federal rules—appellate, criminal, civil, evidence—to remove all the *shall*s and otherwise restyle them. . . . Each *shall* became *must*, *is*, or *may*.") After all, MCL 750.335a(2)(c) still says only that the offense is *punishable* by a "1 day to life" sentence, and "punishable" expresses only the possibility of punishment, not its necessity. Moreover, MCL 767.61a has not been amended, meaning that it still characterizes "1 day to life" as an "alternate" sentence, not a mandatory sentence. Indeed, MCL 767.61a has always phrased the indeterminate sentence option in the same fashion as the postamendment version of MCL 750.335a: "the minimum of which *is* 1 day and the maximum of which

is life." And MCL 767.61a lays out a procedure common to all five sexual-delinquency crimes, yet each of the other four still uses the former "may be punishable" and "shall be 1 day . . . shall be life" wording. The sexual-delinquency alternative sentence is obviously intended to work the same for all five offenses, so if it is optional for the others, it must still be optional for indecent exposure. All signs point to the 2005 amendment adding only the aggravated indecent-exposure offense and making no substantive changes to the "1 day to life" alternative sentence.[18]

Second, we do not believe that *Lockridge* has the significance ascribed to it by the Court of Appeals in *Campbell*. *Lockridge* concluded that the scoring process for the legislative sentencing guidelines violated the Sixth Amendment and, as a remedy for that constitutional violation, directed that henceforth the guidelines would be only advisory. Neither identifying that problem nor crafting that remedy illuminates whether the adoption of the sentencing guidelines and the classification of indecent exposure by a sexually delinquent person as a Class A felony could make legal a sentence that would not have been legal before the sentencing guidelines were adopted. Whether the sentencing guidelines are mandatory or merely advisory is

[18] While not dispositive, we also note that the pertinent legislative analysis does not even allude to an intent to make substantive changes to the meaning of the "1 day to life" option. See House Legislative Analysis, HB 4597 (August 16, 2006). While legislative analyses "are entitled to little judicial consideration," *In re Certified Question*, 468 Mich at 115 n 5 (2003), it is also true that the Legislature "does not, one might say, hide elephants in mouseholes," *Whitman v American Trucking Ass'ns*, 531 US 457, 468; 121 S Ct 903; 149 L Ed 2d 1 (2001). It seems unlikely that such a sea change in the law of indecent exposure, rendering its relationship with the rest of the sexual-delinquency scheme different from all the other sexually-delinquent-person crimes, would go without mention.

neither here nor there; the question is what effect the legislative act of adopting the guidelines had on the sexual-delinquency scheme.

Third and finally, we no longer believe *Buehler III* fully understood the nature of the sexual-delinquency scheme. Its embrace of a vision of dueling mandates between MCL 750.335a and the sentencing guidelines misconstrued the nature of the "1 day to life" sentencing option provided by MCL 750.335a and MCL 767.61a. It appears that the Court of Appeals in the instant case relied on the series of *Buehler* decisions, in particular their caveat that the 2005 PA 300 amendment of MCL 750.335a may have been meaningful, in reaching its decision. By contrast, we have now concluded that the 2005 PA 300 amendment made no meaningful textual adjustment to the statute.

For all these reasons, *Campbell* must be set aside. However, given the significance of this decision, in which we are pointedly embracing *Kelly*,[19] overruling *Butler*, and disavowing *Buehler*, we believe that it is consonant with judicial modesty to remand this matter to the Court of Appeals for reconsideration in light of the revised state of the law. On remand, the Court of Appeals should resolve what effect the adoption of the legislative sentencing guidelines had on the operation of the sexual-delinquency scheme as we have construed it before the guidelines were adopted. We leave it to the parties and the Court of Appeals to decide what questions must be addressed to resolve that

[19] We note that *Kelly* did not acknowledge the possibility of probation when it said that the trial court had the choice of an up-to-1-year sentence, a fine of up to $500, or a "1 day to life" sentence. This may have been because the judge imposed a life sentence in *Kelly*, meaning probation was apparently not a plausible consideration. Even while endorsing *Kelly* in certain respects, we express no opinion on the role of probation in sexual-delinquency sentencing.

issue.[20] This will best allow the strongest arguments to be developed as to what rule should apply to this defendant and future defendants.

VI. CONCLUSION

As noted, we believe that *Kelly* correctly construed the sexual-delinquency "1 day to life" scheme as an *option* a trial court could use its discretion to consider imposing alongside the other statutory penalties available under the statute (at that time, up to 1 year in jail, which was expanded by 2005 PA 300 to be as much as

[20] We note certain questions that may be helpful but are not necessarily dispositive in resolving on remand the effect of the legislative sentencing guidelines on the sexual-delinquency scheme. For example, MCL 777.16 says that the sentencing guidelines apply "to felonies enumerated in [the Penal Code] as set forth in sections 16a to 16bb of this chapter." Given our interpretation of the offense, is indecent exposure by a sexually delinquent person a distinct felony "enumerated" in the Penal Code? (While we conclude that the change in language from 2005 PA 300 is immaterial, could its reorganization of MCL 750.335a constitute making this a distinct offense "enumerated" by the Penal Code if it was not before, or was this a mere stylistic change to improve readability?) Does it matter if indecent exposure by a sexually delinquent person is "enumerated" in the Penal Code, given that the offense is "set forth" in MCL 777.16q as a listed felony? (If it does not matter, what is the function of MCL 777.16, or is it surplusage?) If many of the sentences provided for in the Class A sentencing grid, MCL 777.62, would not have been legal for this offense under the Penal Code (including the sentence defendant received), can such sentences be made legal because the offense is listed in the Code of Criminal Procedure as a Class A felony? That is to say, where, as here, the legislative sentencing guidelines provide for a penalty that contradicts the penalty provided in the Penal Code for an offense, are the sentencing guidelines an amendment (or repeal) of inconsistent provisions of the Penal Code by implication such that the guidelines control? If so, are there any constitutional problems with such an arrangement; for example, does it comport with Const 1963, art 4, § 25? Are our decisions in *Frontczak* and *Boulanger*, dealing with the first Goodrich Act, relevant to answering these questions, or distinguishable? Is the rule of lenity implicated? See *People v Hall*, 499 Mich 446, 458 n 38; 884 NW2d 561 (2016).

2 years in prison for aggravated indecent exposure). We hold that the switch in 2005 PA 300 from "may be punishable" to "is punishable," and "the minimum of which shall be 1 day" to "the minimum of which is 1 day," and "the maximum of which shall be life" to "the maximum of which is life," is merely stylistic. We conclude that *Lockridge*'s constitutional remedy is not pertinent to the outcome of this case. And we disavow *Buehler* as having been premised on a misconception of the law of sexual delinquency.

In light of these conclusions, we set aside *Campbell*, vacate the opinion of the Court of Appeals in the instant case, and remand the instant case to the Court of Appeals to consider, in light of these rulings, what effect the adoption of the legislative sentencing guidelines in 1998—and in particular, their classification of the instant offense as a Class A felony—had on a trial court's options in sentencing a defendant convicted of indecent exposure by a sexually delinquent person.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and WILDER, JJ., concurred with CLEMENT, J.

ALLY FINANCIAL INC v STATE TREASURER

SANTANDER CONSUMER USA INC v STATE TREASURER

Docket Nos. 154668, 154669, and 154670. Argued on application for leave to appeal January 10, 2018. Decided July 20, 2018.

Ally Financial Inc. (Docket No. 154668) and Santander Consumer USA Inc. (Docket Nos. 154669 and 154670) (collectively, plaintiffs) brought separate actions in the Court of Claims against the State Treasurer, the State of Michigan, and the Department of Treasury (the department), seeking refunds under the bad-debt statute, MCL 205.54i, for taxes paid on vehicles financed through installment contracts. Santander's predecessor in interest and Ally entered into financing agreements with various automobile dealerships under which an automobile purchaser entered into an installment contract with the dealership and the dealership financed the purchase price and the sales tax and remitted that tax to the state. Plaintiffs in turn paid the particular dealership the purchase price and sales tax, and the dealership assigned the installment contract to plaintiffs, giving plaintiffs the right to collect the assigned installment contract payments and the right to repossess the vehicle if a purchaser defaulted on the contract payment. When plaintiffs determined that certain installment agreements were uncollectable after the automobile purchasers defaulted on their installment contracts, plaintiffs repossessed and resold many of the vehicles for amounts less than the purchasers owed under the individual installment contracts. Each plaintiff wrote off the outstanding balances as bad debts for federal income tax purposes under 26 USC 166, and each plaintiff filed refund requests under MCL 205.54i with the department for the prorated share of the previously paid Michigan sales tax attributable to the bad debts remaining on the delinquent accounts. The department denied plaintiffs' refund requests, reasoning that (1) plaintiffs were not entitled to any refunds for the debts associated with vehicles that were repossessed because MCL 205.54i excludes "repossessed property" from the statute's definition of "bad debt"; (2) plaintiffs failed to support their claims with the required RD-108 forms, and the alternative documentation provided by plaintiffs to support the amount of taxes paid

was insufficient; and (3) Ally lacked appropriate election forms designating itself, rather than the various dealerships, as the party entitled to claim the tax refund. The court, MICHAEL J. TALBOT, C.J., agreed with the department's arguments and granted summary disposition in favor of defendants. Plaintiffs each appealed, and the appeals were consolidated. The Court of Appeals, JANSEN, P.J., and K. F. KELLY and O'BRIEN, JJ., affirmed in a published decision. 317 Mich App 316 (2016). The Supreme Court ordered and heard oral argument on whether to grant plaintiffs' applications for leave to appeal or take other action. 500 Mich 1010 (2017).

In a unanimous opinion by Justice VIVIANO, the Supreme Court, in lieu of granting leave to appeal, *held*:

Under MCL 205.54i, retailers and lenders may seek a refund for sales tax paid on gross proceeds that are uncollectible as a bad debt. Repossessed property, which is excluded from the definition of "bad debt" in MCL 205.54i(1)(a), includes only what the taxpayer has collected under an installment contract at the time of the default, that is, the portion of the debt related to the value of the repossessed property. The department therefore erred by interpreting "repossessed property" as meaning the value of the entire attached account before the property was repossessed. The department did not abuse its discretion by requiring plaintiffs to support their claims for tax refunds with validated RD-108 forms, but the department erred by rejecting Ally's election forms.

1. MCL 205.52(1) of the general sales tax act (GSTA), MCL 205.51 *et seq*., requires retailers to pay a 6% tax on gross sale proceeds, which includes purchases on credit; the sales tax is due at the time of purchase, not when each installment payment is made. MCL 205.54i provides that retailers and lenders may seek a refund for sales tax paid on gross proceeds that are uncollectible as a bad debt. To that end, MCL 205.54i(2) provides that a taxpayer may deduct the amount of bad debts from his or her gross proceeds used for computation of the tax. Under MCL 205.54i(1)(a), the term "bad debt" means any portion of a debt that is related to a sale at retail taxable under the GSTA and that can be claimed as a deduction pursuant to 26 USC 166; the term specifically does not include, among other things, repossessed property. MCL 205.54i(1)(a) and 26 USC 166 both contemplate that a debt can be divisible; the term "repossessed property" encompasses only what the taxpayer has collected—that is, the value of the repossessed property—it does not refer to the entire value of the account before the property was repossessed. By including "repossessed property"—but not the attached

account—in the list of exclusions from "bad debt," MCL 205.54i(1)(a) plainly indicates that only the portion of the debt related to the value of the repossessed property is excluded. Reading the other items in MCL 205.54i(1)(a) that are excluded from the definition of "bad debt" together with the excluded "repossessed property," it is also clear that the Legislature did not intend to impose a sales tax on consideration that becomes worthless. Further, § 320 of the Streamlined Sales and Use Tax Agreement (SSUTA), of which Michigan is a member state, further supports this interpretation. The SSUTA contains a list of bad-debt exclusions similar to that of MCL 205.54i(1)(a), which demonstrates that the exclusions are monetary amounts that must be subtracted from bad debt based on the consideration ultimately received; a majority of the other SSUTA member states similarly interpret the bad-debt language in their respective statutes. In this case, the department argued that MCL 205.54i does not permit tax refunds on any debts associated with repossessed property, including the amounts the taxpayer did not recover in a sale made on an installment contract. The Court of Appeals erred by upholding the department's interpretation because "repossessed property" encompasses only that portion of the debt related to the value of the repossessed property, not the value of the entire attached account.

2. MCL 205.54i(4) provides that any claim for a bad-debt deduction under MCL 205.54i must be supported by that evidence required by the department. In that regard, the department requires taxpayers to provide validated RD-108 forms supporting their claims for tax refunds, reasoning that the Secretary of State will only issue that validated form once the sales tax is paid and that the form therefore provides the best evidence that the sales tax was paid and of the amount that was paid. When an agency is granted discretion by a statute, courts will uphold the agency's exercise of the discretion if it is supported by a rational basis. In this case, the department did not abuse its discretion by requiring plaintiffs to provide validated RD-108 forms supporting their respective claims for tax refunds. Except in certain circumstances, plaintiffs failed to provide RD-108 forms, and the internal records provided by plaintiffs did not establish that the taxes were actually remitted. Accordingly, because plaintiffs failed to establish that there was no rational basis for the department's requirement that RD-108 forms accompany any tax-refund request under MCL 205.54i, the Court of Appeals correctly upheld the department's decision to require those forms.

3. MCL 205.54i(1)(e) provides that bad-debt refunds may be claimed by a taxpayer, defined as a retailer who remitted the sales tax to the department or the lender holding the account receivable. To that end, MCL 205.54i(3) requires that a lender seeking a refund under the statute provide a written election form, specifying that it, rather than the taxpayer, may claim the refund. To claim a bad-debt deduction or refund under the statute, MCL 205.54i(2) requires that the debt must have been charged off as uncollectible in the records of the entity claiming the deduction or refund. In this case, Ally paid the dealerships the entire cost, including sales tax, of the purchased vehicles in exchange for the right to collect under the installment contracts. Ally provided election forms to the department for 2012 through 2014, which specified that Ally was entitled to claim any sales tax refunds as a result of bad debt on any and all accounts currently existing or created in the future which had been assigned from the retailer to the lender. Because accounts that are written off are still collectible and only deemed worthless for tax computation and accounting purposes, the Court of Appeals erred by holding that the accounts Ally had previously written off were not "currently existing" as stated in its election forms. Accordingly, the Court of Appeals erred by upholding the department's rejection of Ally's election forms.

Affirmed in part, reversed in part, and remanded to the Court of Claims for further proceedings.

1. TAXATION — GENERAL SALES TAX ACT — BAD-DEBT STATUTE — DEFINITION OF "BAD DEBT" — REPOSSESSED PROPERTY.

MCL 205.54i(1)(a) defines "bad debt" for purposes of the exemption from sales tax; the term "bad debt" means any portion of a debt that is related to a sale at retail taxable under the general sales tax act, MCL 205.51 *et seq*., and that can be claimed as a deduction pursuant to 26 USC 166; the term "bad debt" specifically does not include, among other things, repossessed property; the term "repossessed property" encompasses only what a taxpayer has collected—that is, the value of the repossessed property—it does not refer to the entire value of the account before the property was repossessed.

2. TAXATION — GENERAL SALES TAX ACT — BAD-DEBT STATUTE — EVIDENCE REQUIRED TO SUPPORT A CLAIM FOR A BAD-DEBT DEDUCTION.

MCL 205.54i(4) provides that any claim for a bad-debt deduction under MCL 205.54i shall be supported by that evidence required by the Department of Treasury; the statute gives the department discretion to determine what evidence is required to support the taxpayer's request for a sales tax refund under MCL 205.54i(1)(a).

Bodman LLP (by *Joseph J. Shannon*) and *Akerman LLP* (by *Michael Bowen*) for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Jessica A. McGivney* and *Emily C. Zillgitt*, Assistant Attorneys General, for defendants.

VIVIANO, J. Plaintiffs are financing companies that seek tax refunds under Michigan's bad-debt statute, MCL 205.54i, for taxes paid on vehicles financed through installment contracts. Defendant Department of Treasury (the Department) denied the refund claims on three grounds: (1) MCL 205.54i excludes debts associated with repossessed property, (2) plaintiffs failed to provide RD-108 forms evidencing their refund claims, and (3) the election forms provided by plaintiff Ally Financial Inc. (Ally), by their terms, did not apply to the debts for which Ally sought tax refunds. The Court of Claims and the Court of Appeals affirmed the Department's decision on each of these grounds. We hold that the Court of Appeals erred by upholding the Department's decision on the first and third grounds but agree with the Court of Appeals' decision on the second ground. Accordingly, we reverse the Court of Appeals as to the first and third grounds, affirm its decision as to the second ground, and remand to the Court of Claims for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs, Ally and Santander Consumer USA Inc. (Santander), are financing companies seeking refunds for bad debts associated with vehicles that plaintiffs financed through installment contracts. Santander's predecessor in interest and Ally entered into financing

agreements with various auto dealerships. Under the financing agreements, purchasers would enter into installment contracts with the dealerships under which the dealerships would finance the entire purchase price and the sales tax and remit the tax to the state. The dealerships would then assign the installment contracts to plaintiffs in exchange for the full amount of the purchase price and sales tax. Plaintiffs would obtain the right to collect under the contracts and repossess the vehicles upon default.

Over time, some of the vehicle owners defaulted on their installment contracts. When collection efforts failed, plaintiffs deemed a number of these agreements to be worthless and uncollectable. Plaintiffs repossessed and resold many of the vehicles, but the sale price at times would not recoup the entire amount of the outstanding debt. Plaintiffs wrote the outstanding balances off their books as bad debts for federal income tax purposes under 26 USC 166. Plaintiffs also filed refund requests with the Department to recoup under MCL 205.54i the prorated share of the previously paid Michigan sales tax attributable to the bad debts remaining on these accounts.

The Department denied plaintiffs' refund requests. First, the Department determined that plaintiffs were not entitled to any refunds for debts associated with repossessed vehicles because MCL 205.54i excludes "repossessed property" from its definition of bad debt.[1] Second, the Department advised plaintiffs that they were required to support their claims with RD-108 forms, which dealers submit to the Secretary of State along with the sales tax due in exchange for a vehicle

[1] Both plaintiffs' refund requests involved a combination of accounts attached to vehicles that had been repossessed and accounts attached to vehicles that had not been repossessed.

title and a validated copy of the form. Plaintiffs argued that they generally do not have copies of this form and offered alternative documentation as to the amount of taxes paid. The Department rejected plaintiffs' documentation and insisted that RD-108 forms were required to prove that taxes were actually paid. Finally, the Department concluded that Ally lacked appropriate election forms designating itself, rather than the dealership, as the party entitled to claim the tax refund.

Plaintiffs first appealed the Department's decision by requesting an informal conference. The referee at the conference recommended that the refund requests be denied, and the Department followed the recommendation. Plaintiffs appealed this decision in the Court of Claims. The Court of Claims granted summary disposition to defendants, agreeing that "bad debts" do not include repossessed property and that plaintiff Ally did not have valid election forms. It also upheld the Department's decision to require the RD-108 forms, explaining that the Legislature gave the Department discretion to determine what evidence was required to support a refund claim.

The Court of Appeals consolidated plaintiffs' cases on appeal and affirmed. Regarding the proper interpretation of "repossessed property," the Court of Appeals agreed with the Department that MCL 205.54i does not permit refunds on any debts associated with repossessed property. In reaching this conclusion, the Court looked to a prior unpublished opinion of the Court of Appeals, *DaimlerChrysler Servs of North America, LLC v Dep't of Treasury*.[2] Neither opinion, however, offered a substantive analysis of MCL 205.54i. Instead,

[2] *DaimlerChrysler Servs of North America, LLC v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued January 21, 2010 (Docket No. 288347).

the Court of Appeals here concluded summarily that "[t]he Department's interpretation is consistent with the plain and unambiguous language of the bad debt statute."[3] Regarding the Department's decision to require RD-108 forms, the Court of Appeals agreed with the Court of Claims that MCL 205.54i conferred discretion upon the Department to require these forms as evidence of plaintiffs' claims.[4] Finally, the Court upheld the Department's determination that the election forms provided by Ally did not satisfy the statute.[5]

Following plaintiffs' appeal in our Court, we ordered argument on the application, directing the parties to address:

> (1) whether MCL 205.54i prohibits partial or full tax refunds on bad debt accounts that include repossessed property; (2) whether the Court of Appeals erred in giving the Department of Treasury's interpretation of MCL 205.54i respectful consideration in light of MCL 24.232(5); (3) how this Court should review the Department's decision to require RD-108 forms pursuant to MCL 205.54i(4) and, under that standard, whether the decision was appropriate; and (4) whether the Court of Appeals erred in holding that Ally Financial's election forms did not apply to accounts written off prior to the retailers' execution of the forms.[6]

II. STANDARD OF REVIEW

We review de novo questions of statutory interpretation.[7] While we have historically held that tax exemptions and deductions must be construed narrowly in

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[3] *Ally Fin, Inc v State Treasurer*, 317 Mich App 316, 337; 894 NW2d 673 (2016).

[4] *Id*. at 330-333.

[5] *Id*. at 326-330.

[6] *Ally Fin, Inc v State Treasurer*, 500 Mich 1010 (2017).

[7] *People v Pinkney*, 501 Mich 259, 267; 912 NW2d 535 (2018).

favor of the government,[8] we have also explained "that this requirement does not permit a 'strained construction' that is contrary to the Legislature's intent."[9]

III. ANALYSIS

MCL 205.54i permits retailers and lenders to seek a refund for sales taxes paid on a "bad debt," as defined by the statute.[10] If lenders such as plaintiffs seek the tax refund, they must provide a written election form, specifying that they, rather than the taxpayer, may claim the refund.[11] The statute further provides that any claim "shall be supported by that evidence required by the department."[12] For the reasons expressed below, we hold that two of the three bases provided by the Department for rejecting plaintiffs' refund claims in this case were erroneous.[13]

A. MEANING OF "REPOSSESSED PROPERTY" WITHIN MCL 205.54i

Determining the meaning of "repossessed property"

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[8] *Detroit v Detroit Commercial College*, 322 Mich 142, 149; 33 NW2d 737 (1948).

[9] *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 71; 894 NW2d 535 (2017), quoting *Mich United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664-665; 378 NW2d 737 (1985).

[10] MCL 205.54i is part of Michigan's General Sales Tax Act (GSTA), MCL 205.51 *et seq*.

[11] MCL 205.54i(3).

[12] MCL 205.54i(4).

[13] This is not a case in which the Department's decision can be upheld in its entirety because it provided at least one valid basis for denying plaintiffs' claims. Instead, each basis provided by the Department only applied to a portion of the bad-debt accounts held by plaintiffs—i.e., the accounts for which plaintiffs had repossessed the vehicle, the accounts for which plaintiffs did not provide RD-108 forms, and the accounts for which Ally purportedly did not provide valid election forms. Accordingly, it is necessary to address the validity of each basis provided by the Department for rejecting plaintiffs' claims.

under MCL 205.54i requires careful application of our rules of statutory interpretation. When interpreting unambiguous statutory language, "the statute must be enforced as written. No further judicial construction is required or permitted."[14] "[O]ur goal is to give effect to the Legislature's intent, focusing first on the statute's plain language."[15] We must "examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme."[16] In doing so, we "consider the entire text, in view of its structure and of the physical and logical relation of its many parts."[17]

The term "repossessed property" in MCL 205.54i is nestled within an intricate tax scheme. Consequently, its context within the GSTA is critical to uncovering its meaning. The starting point is the GSTA, which requires retailers to pay a 6% tax on all sale proceeds. The relevant statute, MCL 205.52(1), provides:

> Except as provided in section 2a, there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail,[18] by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act.

The tax is exacted based on the "gross proceeds" of businesses making retail sales. "Gross proceeds" is

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[14] *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (quotation marks and citation omitted).

[15] *Id*. (quotation marks and citation omitted).

[16] *Id*.

[17] Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167.

[18] MCL 205.51(b) defines "sale at retail" as "a sale, lease, or rental of tangible personal property for any purpose other than for resale, sublease, or subrent."

defined by statute to mean "sales price,"[19] which in turn "means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise . . . ."[20] Thus, the tax is levied on the monetary value of the consideration a retail seller receives, whether that consideration comes in the form of money or not.

By its plain terms, "gross proceeds" encompasses purchases on credit.[21] When the buyer charges on credit, the tax becomes due at the completion of the contract for purchase and not when each installment payment is made.[22] Because the tax is due immediately, a seller may end up paying taxes on credit sales that never result in the actual receipt of any or all of the agreed upon consideration. In such cases, the seller has paid taxes on a buyer's mere promise to pay.

The GSTA addresses this situation by creating a framework for sellers to recoup the sales tax paid based on "gross proceeds" that turn out to be worthless.[23] MCL 205.54i(2) provides that "[i]n computing the amount of tax levied under this act for any month,

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[19] MCL 205.51(1)(c).

[20] MCL 205.51(1)(d).

[21] The term "credit" "refers to a charge on account, made upon the sale of the merchandise." *Gardner-White Co v State Bd of Tax Admin*, 296 Mich 225, 233; 295 NW 624 (1941) (interpreting a prior version of the GSTA).

[22] *Id*.

[23] See *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 480; 838 NW2d 736 (2013) ("[T]he bad debt provision allows taxpayers to recover overpayment when expected sales proceeds are not received.") (quotation marks and citation omitted); see also *Citizens' Acceptance Corp v United States*, 462 F2d 751, 756 (CA 3, 1972) (noting that the bad-debt deduction accounts, in part, for "amounts reported as income but ultimately not collected because they became worthless").

a taxpayer may deduct the amount of bad debts from his or her gross proceeds used for the computation of the tax." The statute provides the following definition of "bad debt" in MCL 205.54i(1)(a):

> "Bad debt" means any portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166.

Thus a "bad debt" is equal to whatever the seller can deduct from its federal taxes under 26 USC 166, which provides:

> (a) **General rule**.—
>
> (1) **Wholly worthless debts**.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.
>
> (2) **Partially worthless debts**.—When satisfied that a debt is recoverable only in part, the Secretary may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction.

However, MCL 205.54i(1)(a) provides the following list of specified items that are excluded from the definition of "bad debt":

> A bad debt shall not include [i] any finance charge, interest, or sales tax on the purchase price, [ii] uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, [iii] expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, [iv] any accounts receivable that have been sold to and remain in the possession of a third party for collection, and [v] *repossessed property*.[24]

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[24] Emphasis added.

In the present case, we have to make sense of the fifth item, "repossessed property." The statute clearly states that "repossessed property" is not part of a "bad debt" for purposes of a sales tax refund. But what does "repossessed property" mean? Plaintiffs argue that it refers to the value of the repossessed property, while the Department interprets it as referring to the entire value of the account, i.e., the value of the account before the property was repossessed.[25] If "repossessed property" refers to the value of the property, then the uncollectible amount not recouped from the sale of the property would remain a refundable "bad debt." If it refers to the entire account attached to the property, then there would be no "bad debt" to refund.

The Department's interpretation would, in effect, impose a sales tax on consideration that later becomes worthless—it would tax uncollectible debt. This is not a reasonable reading of the text of the statute. Rather, by referencing "repossessed property," the exclusion encompasses only what the taxpayer has collected. The text says nothing about the portion of the debt that remains uncollected, if any, after repossession. Nor does the exclusion mention the account attached to the repossessed property. Instead, it merely states "repossessed property," which indicates that only the value of

[25] See Revenue Admin Bull 2015-27 (noting that a taxpayer "may not claim the bad debt deduction for any amounts represented by the repossessed [property], including the amounts it did not recover in the sale"); Revenue Admin Bull 1989-61 ("The bad debt deduction for sales tax purposes shall not include any amount represented by the following: . . . 6. Sales tax charged on property that is subsequently repossessed.") (quotation marks omitted). We need not reach the issue of whether the bulletins were entitled to "respectful consideration" by the lower courts pursuant to *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 93; 754 NW2d 259 (2008), in light of MCL 24.232(5) because, as explained below, we find that the Department's interpretation conflicts with the plain language of the bad-debt statute.

the repossessed property itself is to be excluded. This makes sense in light of the definition of "bad debt" in both our statute[26] and the federal statute it relies on,[27] each of which states that "bad debt" is a portion of a debt. Accordingly, the statutes contemplate that a debt can be divisible. Thus, by including "repossessed property," but not the attached account, the statute indicates that only the portion of the debt related to the value of the repossessed property is excluded.

This conclusion is confirmed by examining the other exclusions from "bad debt" listed in MCL 205.54i(1)(a).[28] None of these exclusions indicates that the Legislature intended in this section to impose a sales tax on consideration that becomes worthless. The first and third exclusions represent amounts on which the seller was not required to pay sales tax in the first place—"finance charge[s], interest, or sales tax" and "expenses incurred in attempting to collect" on the debts. So it would make little sense to allow a taxpayer to deduct these amounts as "bad debt."

The second and fourth exceptions, on the other hand, represent situations where a seller received full consideration or its equivalent. Under a layaway agreement, addressed by the second exception, the seller remains in possession of the property. When the buyer defaults, the seller receives the full value of the property, which it would not otherwise have retained

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[26] MCL 205.54i(1)(a).

[27] 26 USC 166.

[28] " 'If any section [of a law] be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of the other.' " *Reading Law*, p 167, quoting Coke, The First Part of the Institutes of the Laws of England (14th ed), p 381a.

but for the buyer's default.[29] And the full value of the property is presumably the sales price or close enough that the Legislature chose not to allow a tax refund for any diminution in value.[30] Similarly, when a business sells its accounts receivable, the business in exchange receives what it considers to be the fair value of the accounts from the purchaser of the accounts. In both these scenarios, then, the taxpayer has received the equivalent of full consideration in connection with the sale. Thus, if "repossessed property" referred to the value of the account attached to the property regardless of whether or the extent to which any consideration was actually received, it would be unlike all of the other exclusions by allowing taxation of worthless consideration.[31]

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[29] Retaining the property, which presumably has not diminished in value, may be thought of as roughly analogous to the seller having repossessed real property sold on credit and submitting a winning bid at a subsequent sale of the property for the entire amount of the outstanding debt. Cf. *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 88-89; 878 NW2d 816 (2016) (discussing the "full credit bid rule" by which a lender at the foreclosure sale successfully bids the entire remaining debt, thus extinguishing the debt). In that case, no portion of the debt remains owing. Similarly, if a layaway seller retains the item, it has essentially submitted a successful bid on the property for the full amount of the debt (or at least the full amount of the debt that arises from "gross proceeds").

[30] Indeed, a secured party in possession of collateral has a duty to use "reasonable care in the custody and preservation of [the] collateral . . . ." MCL 440.9207(1). To this end, the secured party can use the collateral "for the purpose of preserving the collateral or its value." MCL 440.9207(2)(d).

[31] This same point can be seen through the prism of the associated-words canon (*noscitur a sociis*). Under this interpretive principle, a statutory term must "be viewed in light of the words surrounding it." *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002). The canon applies when words or phrases "are associated in a context suggesting that the words [or phrases] have something in common," and "they should be assigned a permissible meaning that makes them

Our conclusion here is further supported by the framework set forth in the Streamlined Sales and Use Tax Agreement (SSUTA).[32] Michigan is currently a member state under the SSUTA, and has therefore agreed to comply with the SSUTA's required provisions.[33] Section 320 of the SSUTA requires member states to enact legislation allowing for bad-debt deductions. That section includes a list of exclusions from the definition of "bad debt" similar to the list contained in MCL 205.54i:

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similar." *Reading Law*, p 195. Here, the commonality among the other four exclusions is that none imposes a tax on worthless consideration. As noted, the first and third exclusions account for items that never constituted taxable consideration. And the seller in the second and fourth exclusions has received the equivalent of full consideration. Thus, the manifest commonality among the exclusions is that they do not exclude worthless consideration.

[32] The SSUTA is a multistate compact designed to reduce the burden on out-of-state businesses of complying with state sales and use taxation. See Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement*, 40 UC Davis L Rev 1381, 1392-93 (2007). The SSUTA was formed in response to *Quill Corp v North Dakota*, 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992), which held that, under the current state taxation regime, the Commerce Clause requires that states only impose sales and use taxes on businesses that have some physical presence in the state. *Designing Interstate Institutions*, 40 UC Davis L Rev at 1389-1392. The SSUTA was drafted over a period of two years by a coalition of state legislators, state revenue department administrators, and local government officials. Hellerstein & Swain, Streamlined Sales and Use Tax, ¶ 2.04 (2004). Member states to the SSUTA agree to enact legislation reflecting the provisions set forth in the SSUTA. *Designing Interstate Institutions*, 40 UC Davis L Rev at 1393.

[33] See the Streamlined Sales and Use Tax Administration Act, MCL 205.801 *et seq*. Our bad-debt statute, enacted by 1982 PA 23, predates the SSUTA, to which our state became a signatory in 2005. And while provisions of the SSUTA that are inconsistent with our law do not have effect and may not be read as invalidating or amending any provision of our law, see MCL 205.811(1) and (5), analogous provisions of the SSUTA that are consistent with our laws are of some use in providing insight into the meaning of our statute.

> Each member state shall use the following to provide a deduction for bad debts to a seller. To the extent a member state provides a bad debt deduction to any other party, the same procedures will apply. Each member state shall:
>
> A. Allow a deduction from taxable sales for bad debts. Any deduction taken that is attributed to bad debts shall not include interest.
>
> B. Utilize the federal definition of "bad debt" in 26 U.S.C. Sec. 166 as the basis for calculating bad debt recovery. However, the amount calculated pursuant to 26 U.S.C. Sec. 166 shall be adjusted to exclude: financing charges or interest; sales or use taxes charged on the purchase price; uncollectable amounts on property that remain in the possession of the seller until the full purchase price is paid; expenses incurred in attempting to collect any debt, and repossessed property.[34]

This section demonstrates that the exclusions are monetary amounts that must be subtracted from "bad debt" based upon the consideration actually received. That the Legislature was focused on this correlation is further illustrated by the fact that both the SSUTA and our statute provide that if taxes on "bad debt" are refunded, but that "bad debt" is subsequently collected, the taxpayer must pay back the refunded taxes.[35]

Finally, considering how other jurisdictions handle the present issue also supports our view. Because 23 other states are members of the SSUTA, 23 other

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[34] SSUTA, § 320.

[35] See MCL 205.54i(2) ("If a consumer or other person pays all or part of a bad debt with respect to which a taxpayer claimed a deduction under this section, the taxpayer is liable for the amount of taxes deducted in connection with that portion of the debt for which payment is received and shall remit these taxes in his or her next payment to the department."); SSUTA, § 320(D) ("[I]f a deduction is taken for a bad debt and the debt is subsequently collected in whole or in part, the tax on the amount so collected must be paid and reported on the return filed for the period in which the collection is made.").

states have bad-debt provisions similar to ours. A majority of the states that have addressed this issue have agreed with the interpretation offered above.[36]

[36] Nine states have clarified that only the value of the repossessed property is excluded. See Ind Code 6-2.5-6-9(d)(2) ("The amount of the deduction shall be determined in the manner provided by Section 166 of the Internal Revenue Code for bad debts but shall be adjusted to exclude: . . . (E) repossessed property.") and *SAC Fin, Inc v Indiana Dep't of State Revenue*, 24 NE3d 541, 546 (Ind Tax Ct, 2014) ("Subsection (d) requires a taxpayer to exclude amounts that reduce the original sales tax base (*i.e.*, the value of repossessed property or property still in the seller's possession) and that were not part of the original retail sales tax base (*i.e.*, interest, financing charges, sales or use tax, and debt collection expenses) from the difference between gross retail income and the amount of the federal bad debt."); Minn Stat 289A.40 ("[T]he following are excluded from the calculation of bad debt: . . . repossessed property.") and Minn Admin R 8130.7400(4) ("In the case of repossessions, an uncollectible debt deduction is allowable only to the extent that the pro rata portion of all payments and credits, attributable to the cash sales price of the merchandise is less than the net contract balance (after excluding unearned insurance and finance charges) at the date of repossession."); Neb Rev Stat 77-2708(2)(j)(*i*) ("[T]he amount calculated pursuant to 26 U.S.C. 166 shall be adjusted to exclude: . . . repossessed property.") and 316 Neb Admin Code, R 1-027 ("The sales tax previously remitted by a retailer arising from the sale of property, which is subsequently repossessed, may be allowed as a credit against the retailer's current sales tax liability, but only to the extent of the portion of the purchase price remaining unpaid at the time of repossession."); Nev Rev Stat 372.368(3) ("The amount of any deduction claimed must equal the amount of a deduction that may be claimed pursuant to section 166 of the Internal Revenue Code, 26 U.S.C. § 166, for that sale minus: . . . (e) The value of any property sold that has been repossessed by the retailer."); ND Cent Code 57-39.4-21 ("However, the amount calculated pursuant to 26 U.S.C. 166 shall be adjusted to exclude . . . repossessed property.") and ND Admin Code, R 81-04.1-01-20 ("When retailers sell tangible personal property on time payments, and it becomes necessary for the retailer to repossess the tangible personal property, the transaction is handled as follows: 1. If the retailer previously included the total selling price of the tangible personal property in the retailer's gross sales and remitted tax to the tax commissioner but did not collect sales tax from the buyer, the retailer may enter a credit in the amount of the unpaid balance of the original sale."); SD Codified Laws 10-45-30 ("Bad debts do not include . . .

Again, while these interpretations are not binding on

repossessed property.") and SD Admin R 64:06:01:09 ("If repossession by the finance company becomes necessary, the retailer may deduct as a bad debt, as provided in SDCL 10-45-30, that portion of the tax previously paid, provided that in liquidation of the repossessed merchandise the retailer has actually suffered a loss and the gross receipts prove to be less than anticipated under the original contract price."); Tenn Code Ann 67-4-1030(b) ("A bad debt shall not include . . . repossessed property.") and Tenn Code Ann 67-6-507(d) ("In the event a dealer . . . be required to repossess . . . personal property at a time when the balance due on the unpaid purchase price shall exceed five hundred dollars ($500), the dealer shall be entitled to a credit on the sales tax that the dealer shall be required to collect and remit to the commissioner, in an amount equal to the difference between the amount of the sales tax collected and paid at the time of the original purchase and the amount of sales tax that would be owed on that portion of the purchase price that has actually been paid by the purchaser, plus the sales tax on the first five hundred dollars ($500) of the unpaid balance of the purchase price."); Wash Rev Code 82.08.037(2) ("For purposes of this section, 'bad debts' does not include: . . . (d) Repossessed property.") and Wash Admin Code 458-20-196 ("However, 'bad debts' do not include: . . . (iv) The value of repossessed property taken in payment of debt."); Wis Stat 77.585(1)(a) (" 'Bad debt' does not include . . . repossessed property or items.") and Wis Admin Code Tax 11-30(2)(f) ("*Repossessions*. When property, items, or goods on which a receivable exists are repossessed, a bad debt deduction is allowable only to the extent that the seller sustains a net loss of the sales price upon which tax was paid.").

Three states have adopted the opposite approach. See NC Gen Stat 105-164.13 (setting forth sales tax exemptions without following the format of SSUTA, § 320) and 17 NC Admin Code, R 7B.3002 ("Retailers shall not deduct from their gross taxable sales the unpaid amounts on repossessed merchandise."); Ohio Rev Code Ann 5739.121 (" 'Bad debt' does not include . . . repossessed property.") and Ohio Admin Code 5703-9-44(A) ("No amount can be excluded as a bad debt that represents: . . . (7) Any uncollectible amount on property repossessed by or on behalf of the vendor."); Utah Code Ann 59-12-107 (" '[B]ad debt' does not include: . . . (G) an amount that a seller does not collect on repossessed property.").

Eight states appear to have taken no position on the correct interpretation of the "repossessed property" exclusion. See Ga Code Ann 48-8-45; Iowa Code 423.21; Ky Rev Stat Ann 139.350; NJ Stat Ann 54:32B-20.1; RI Gen Laws 44-18.1-21; 10-060-33 Vt Code R 1.9780; W Va Code 11-15B-27; Wyo Stat Ann 39-15-107. Finally, three states have interpreted the "repossessed property" exclusion in SSUTA, § 320 as excluding only the

our Court, they further confirm that the plain language of the provision supports interpreting "repossessed property" as the value of the repossessed property.

In sum, we hold that the term "repossessed property" encompasses only what a taxpayer has collected—that is, the value of the repossessed property; it does not refer to the entire value of the account before the property was repossessed.

B. WHETHER THE DEPARMENT COULD REQUIRE RD-108 FORMS

Next, we must consider whether the Department properly denied a portion of plaintiffs' claims on the basis that plaintiffs did not provide validated RD-108 forms. We agree with the Court of Appeals that the Department properly exercised its discretion under the bad-debt statute by requiring that plaintiffs provide RD-108 forms evidencing the taxes paid on each vehicle. The bad-debt statute, MCL 205.54i(4), provides:

> Any claim for a bad debt deduction under this section shall be supported *by that evidence required by the department*. The department shall review any change in the rate of taxation applicable to any taxable sales by a taxpayer claiming a deduction pursuant to this section and shall ensure that the deduction on any bad debt does not result in the taxpayer claiming the deduction recovering any more or less than the taxes imposed on the sale that constitutes the bad debt.[37]

The Department required plaintiffs to provide validated RD-108 forms supporting their claims for tax refunds. The RD-108 is an application for vehicle title

expenses incurred in repossessing the property. See Ark Code 26-52-309(b); Kan Stat Ann 79-3674(b); Okla Stat, tit 68, § 1366(B)(4).

[37] Emphasis added.

and registration. The Department argues that, because the Secretary of State will only issue a validated RD-108 once sales tax is paid, the validated RD-108 provides the best evidence that the sales tax was paid and of the amount that was paid. Plaintiffs, on the other hand, argue that because the auto dealerships are the parties that originally pay the taxes, the dealerships have possession of the RD-108 forms and, in some cases, may no longer have the forms in their files. Further, while plaintiffs can obtain the forms by request from the Secretary of State, to do so would cost plaintiffs $11 per form. In light of these circumstances, plaintiffs argue that the Department acted arbitrarily and capriciously by not accepting plaintiffs' alternative documentation—plaintiffs' own spreadsheets tracking the amount of tax paid on each vehicle.

The Department in this case was given discretion by the bad-debt statute to determine the evidence required to support a party's claim for a deduction or refund.[38] When an agency is granted discretion by a statute, the agency's exercise of that discretion will be upheld if supported by a rational basis.[39] Except for the accounts for which plaintiffs produced the RD-108 forms, plaintiffs have provided no evidence that sales taxes were actually paid. Plaintiffs provided their own internal records accounting for the payments, but these records do not show that the taxes were actually remitted. Further, while plaintiffs argue that taxes were clearly paid because the Secretary of State issued the vehicle titles, the fact that a title was issued does

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[38] MCL 205.54i(4).

[39] See *Guardian Indus Corp v Dep't of Treasury*, 198 Mich App 363, 381-382; 499 NW2d 349 (1993) ("The SBTA gives the Commissioner of Revenue discretion to allow consolidation of tax returns. We will uphold the commissioner's decision not to allow consolidation retroactively, unless there is no rational basis for it. See *Clarke-Gravely Corp v Dep't of Treasury*, 412 Mich 484, 489; 315 NW2d 517 (1982).").

not conclusively establish that taxes were paid[40] and does not indicate the amount of taxes paid. As a result, plaintiffs have not shown that the Department's requirement that plaintiffs provide the validated RD-108 forms had no rational basis.[41] Accordingly, we agree with the Court of Appeals that the Department properly exercised its discretion under the bad-debt statute by requiring that plaintiffs provide RD-108 forms evidencing the taxes paid on each vehicle.

C. WHETHER ALLY PRESENTED VALID ELECTION FORMS

Finally, we must consider the Department's determination that Ally did not present valid election forms supporting its refund claims. These forms, like all legal texts, must be interpreted according to their plain language.[42] We conclude that the Department's interpretation is incompatible with the plain language of the election forms.

Under MCL 205.54i, two entities can potentially claim a bad-debt refund—the retailer that remitted the sales tax to the Department or the lender holding the account receivable.[43] The statute requires that the

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[40] For example, the vehicle purchase may be exempted from taxation. See MCL 257.815(1) ("Each application for registration . . . shall be accompanied by a statement showing the amount of the sales tax due upon the sale of the motor vehicle, . . . except *if the sale of a motor vehicle is exempt by law from the payment of the sales tax, a tax shall not be paid*.") (emphasis added).

[41] And, as noted above, plaintiffs are not left without any method of obtaining the refunds because they can obtain these forms from the Secretary of State for a reasonable cost.

[42] *Reading Law*, p xxvii ("Our legal system must regain a mooring that it has lost: a generally agreed on approach to the interpretation of legal texts. . . . We look for meaning in the governing text . . . .").

[43] MCL 205.54i(1)(e) (" 'Taxpayer' means a person that has remitted sales tax directly to the department on the specific sales at retail

party seeking a tax refund for a bad debt must provide the Department with a written election document designating whether the retailer or the lender may claim the refund.[44] MCL 205.54i(3) provides:

> After September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid if all of the following conditions are met:
>
> (a) No deduction or refund was previously claimed or allowed on any portion of the account receivable.
>
> (b) The account receivable has been found worthless and written off by the taxpayer that made the sale or the lender on or after September 30, 2009.

In this case, Ally paid the auto dealerships the entire cost, including sales tax, of the purchased vehicles in exchange for the right to collect under the installment contracts. Ally provided the Department with election forms that were executed by Ally and the dealerships between 2012 and 2014. These election documents contained the following provision designating Ally as the party entitled to claim the tax refund:

> The Retailer and the Lender agree that the Lender is the party entitled to claim any potential sales tax refunds or deductions under MCL 205.54i as a result of bad debt losses charged off after September 30, 2009, *on any and all Accounts currently existing or created in the future* which have been assigned from the Retailer to the Lender.[45]

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transaction for which the bad debt is recognized for federal income tax purposes or, after September 30, 2009, a lender holding the account receivable for which the bad debt is recognized, or would be recognized if the claimant were a corporation, for federal income tax purposes.").

[44] MCL 205.54i(3).

[45] Emphasis added.

The Department argues that because the forms only apply to accounts "currently existing or created in the future," the forms do not apply to accounts which were written off prior to the execution of the election forms. The question, then, is whether Ally's accounts written off prior to execution of the election documents were "currently existing" accounts.

Some background on when and how accounts must be written off is helpful in addressing this issue. In order to claim a bad-debt deduction or refund under the statute, the debt must have been charged off as uncollectible in the records of the entity claiming the deduction or refund.[46] MCL 205.54i(2) provides:

> In computing the amount of tax levied under this act for any month, a taxpayer may deduct the amount of bad debts from his or her gross proceeds used for the computation of the tax. *The amount of gross proceeds deducted must be charged off as uncollectible on the books and records of the taxpayer* at the time the debt becomes worthless and deducted on the return for the period during which the bad debt is written off as uncollectible in the claimant's books and records and must be eligible to be deducted for federal income tax purposes.[47]

A write-off is simply an internal recognition by a lender that an account is worthless after attempts at collection have failed. As the Supreme Court of Wisconsin has explained, "When a lending institution 'writes off' a 'bad debt,' it is merely indicating that the debt is uncollectible. That is, it is no longer an asset of the institution. A 'write off' does not mean that the institution has forgiven the debt or that the debt is not still owing."[48]

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[46] MCL 205.54i(2).

[47] Emphasis added.

[48] *Mitchell Bank v Schanke*, 268 Wis 2d 571, 582 n 7; 2004 WI 13; 676 NW2d 849 (2004).

Our Legislature has recognized that the debt is still owing—and may be collected—after it is written off and has required taxpayers to repay the amount deducted as bad debt on such amounts.[49] Because written-off accounts still continue to be collectible and are only deemed worthless for tax computation and accounting purposes, the Court of Appeals erred by holding that Ally's previously written-off accounts were not "currently existing" at the time that the election forms were executed.

IV. CONCLUSION

For the reasons discussed above, we hold that the Court of Appeals erred by upholding the Department's interpretation of "repossessed property" and by upholding the Department's rejection of Ally's election forms, but we hold that the Court of Appeals properly upheld the Department's decision to require RD-108 forms from plaintiffs. Accordingly, we reverse the Court of Appeals' decision to uphold the Department's denial on the basis that the statute excludes debts associated with repossessed property and that plaintiff Ally's election forms did not apply to the debts at issue. We affirm the Court of Appeals' decision with respect to the Department's denial of a portion of plaintiffs' claims on the basis that plaintiffs did not provide validated RD-108 forms. We remand to the Court of Claims for further proceedings not inconsistent with this opinion.

MARKMAN, C.J., and ZAHRA, MCCORMACK, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred with VIVIANO, J.

[49] See MCL 205.54i(2).

TROWELL v PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC

Docket No. 154476. Argued on application for leave to appeal December 6, 2017. Decided July 23, 2018.

Audrey Trowell filed an action in the Wayne Circuit Court against Providence Hospital and Medical Centers, Inc., after she sustained injuries while she was hospitalized. Venue was later transferred to the Oakland Circuit Court by stipulation. The injuries from which Trowell's complaint arose resulted when an aide, acting alone, attempted to assist Trowell to the bathroom and dropped her twice during the process. Trowell did not serve Providence Hospital with a notice of intent to sue and failed to file the lawsuit within the two-year period of limitations generally applicable to medical malpractice actions. Providence Hospital moved for summary disposition under MCR 2.116(C)(7) (statute of limitations) and (C)(8) (failure to state a claim). The court, COLLEEN A. O'BRIEN, J., concluded that Trowell's lawsuit sounded in medical malpractice and granted summary disposition in favor of Providence Hospital. Trowell moved for reconsideration and to amend the complaint, and the court denied both motions. Trowell appealed, arguing that the claim was not filed as a medical malpractice action but rather as an ordinary negligence action, that medical expertise was not necessary for a jury to determine whether a hospital aide dropping a patient constituted ordinary negligence, and that summary disposition was premature because discovery had not yet been completed. The Court of Appeals, MURPHY, P.J., and STEPHENS and BOONSTRA, JJ., reversed and remanded the case, concluding that it was impossible to discern the nature of Trowell's claims without additional factual development. 316 Mich App 680 (2016). Providence Hospital applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 500 Mich 965 (2017).

In a per curiam opinion signed by Chief Justice MARKMAN and Justices ZAHRA, BERNSTEIN, and WILDER, the Supreme Court, in lieu of granting leave to appeal, *held*:

Neither party submitted materials beyond the complaint concerning the nature of the claims at issue in this case, and thus review was properly limited to the complaint alone, regardless of whether Providence Hospital's motion was examined under the standards applicable to (C)(7) motions, (C)(8) motions, or some combination of both standards. The Court of Appeals erred by ordering further discovery to determine the nature of Trowell's claims; the nature of Trowell's claims had to be ascertained from the complaint itself under the facts of the case. With the exception of Trowell's claim regarding the second time the aide dropped her, the allegations in Trowell's complaint sounded in medical malpractice and thus were time-barred because the allegations involved matters of medical judgment in the course of Providence Hospital's professional relationship with Trowell and a jury was not likely to possess the knowledge and experience necessary to reach an informed decision as to those matters. However, Trowell's claim addressing the second drop sounded in ordinary negligence—a jury's common knowledge and experience was sufficient to inform its decision regarding the hospital employee's failure to take corrective action in the face of a known danger that had resulted in patient injury.

1. MCR 2.116(G)(5) states that when deciding a motion under MCR 2.116(C)(7), a court must consider, together with the pleadings, all documentary evidence then filed in the action or submitted by the parties but that review of a motion for summary disposition under MCR 2.116(C)(8) is limited to the pleadings. In this case, neither party submitted materials beyond the complaint regarding the nature of Trowell's claims, and thus, review was properly limited to the complaint alone. Therefore, the Court of Appeals erred by ordering further discovery to determine the nature of Trowell's claims.

2. A claim sounds in medical malpractice if the conduct on which the claim is based occurred in the context of a professional relationship and the claim raises questions of medical judgment beyond the common knowledge and experience of a jury. Trowell's complaint contained the following claims: (1) insufficient staff to assist Trowell; (2) improper physical handling of Trowell, which claim could be further divided into a claim related to the first time Trowell was dropped and a claim related to the second time Trowell was dropped; (3) failure to properly supervise; and (4) failure to properly train. With the exception of the claim regarding the second time Trowell was dropped, these claims all sounded in medical malpractice. Staffing decisions and patient monitoring involve questions of professional medical manage-

ment. Properly assisting Trowell required consideration of her individualized medical needs. Properly supervising Trowell's care while she was in Providence Hospital was beyond the common knowledge and experience of an ordinary layman. For a jury to determine whether Providence Hospital had properly trained its staff would have required expert testimony to explain the proper methods of moving Trowell and to identify Trowell's individualized needs. Accordingly, all but one of Trowell's claims sounded in medical malpractice and were time-barred.

3. The first time the aide dropped Trowell sounded in medical malpractice because the context of moving Trowell under the circumstances required medical judgment involving an individualized assessment of Trowell's needs. The second drop sounded in ordinary negligence because a jury relying on common knowledge and experience could determine whether Providence Hospital was negligent for failing to take corrective action in response to a known danger—that is, for failing to call for assistance or to retrieve additional equipment to aid in Trowell's movement after Trowell was dropped and injured the first time. Instead of taking corrective action, the aide attempted the same action that had already failed and had injured Trowell. Trowell's complaint, as it related to the second drop, set forth a claim that a jury relying only on common knowledge and experience could decide, and therefore, the claim sounded in ordinary negligence.

Reversed and remanded.

Justice VIVIANO, joined by Justices MCCORMACK and CLEMENT, concurring, agreed with the majority that the nature of the claims in Trowell's complaint should have been determined on the basis of the complaint alone and that Trowell's complaint contained only one allegation of ordinary negligence. However, Justice VIVIANO disagreed with the majority's reasoning. The majority based its conclusion on the fact that none of the parties submitted any material to the court in the matter. The problem with this rationale was that it implied that determining the nature of a claim can be converted into a factual issue when a party submits evidence on the matter. *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411 (2004), charted a wayward course that permits consideration of facts outside the pleadings to decide what claims a plaintiff has asserted. However, under basic pleading principles, the nature of claims must be determined by the sufficiency of the pleadings, not by the sufficiency of the evidence. A trial court, when faced with a motion alleging untimely claims that also requires the court to determine the nature of the claims, must, under MCR 2.116(C)(8), make the latter determination

solely by reference to the complaint. Once the nature of a claim has been established, the court must then determine whether the claim was timely under MCR 2.116(C)(7). When a motion for summary disposition is based on MCR 2.116(C)(7), MCR 2.116(G)(5) directs courts to consider then-filed documentary evidence outside the pleadings—affidavits, depositions, admissions, etc. The majority reads a prohibition into the rule—according to the majority, a court is prohibited from ordering further factual development to decide the motion. But MCR 2.116(G)(5) is a rule of inclusion, not exclusion. Nothing in the rule establishes that a court is prohibited from considering any other evidence. The majority's approach allows the factual record in a case to crystallize even when discovery has not yet been completed. In fact, the Supreme Court has taken the opposite tack in past cases dealing with motions subject to MCR 2.116(G)(5). In addition, summary disposition is often premature without sufficient factual development, and dismissal without further factual development when a question of fact related to recovery exists may be inappropriate. Moreover, MCR 2.116(I)(3) authorizes an immediate trial on disputed issues of fact when a motion for summary disposition is based on MCR 2.116(C)(7), suggesting that MCR 2.116(G)(5) is not a prohibition on evidentiary development. In this case, discovery was incomplete—Trowell had not yet even deposed the aide who dropped her, and the aide would have likely been the central witness. The majority's outcome would prevent a court from considering the aide's testimony simply because Providence Hospital successfully filed its motion for summary disposition before the conclusion of discovery. When determining the nature of a complaint, review is properly limited to the complaint alone.

SUMMARY DISPOSITION — PERIOD OF LIMITATIONS — DETERMINING THE NATURE OF THE CLAIM — MATERIALS THAT MAY BE REVIEWED.

MCR 2.116(G)(5) states that when deciding a motion under MCR 2.116(C)(7), a court must consider, together with the pleadings, all documentary evidence then filed in the action or submitted by the parties, but review of a motion for summary disposition under MCR 2.116(C)(8) is limited to the pleadings; when a defendant moves for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8) alleging untimely claims and the court must determine the nature of the claims in order to resolve the motion and neither party has submitted materials beyond the complaint, the court's review is limited to the complaint alone.

Carla D. Aikens, PC (by *Carla D. Aikens*), *Olsman MacKenzie & Wallace* (by *Jules B. Olsman*, *Donna M. MacKenzie*, and *Ben C. Lesnick*), and *Mark Granzotto, PC* (by *Mark Granzotto*) for Audrey Trowell.

Grier, Copeland & Williams, PC (by *Rhonda Y. Reid Williams*) for Providence Hospital and Medical Centers, Inc.

Amici Curiae:

Collins Einhorn Farrell PC (by *Michael J. Cook*) for the West Branch Regional Medical Center.

Kerr, Russell and Weber, PLC (by *Joanne Geha Swanson* and *Jacquelyn A. Klima*) for the American Medical Association and the Michigan State Medical Society.

PER CURIAM. At issue in this case is whether plaintiff's claims sound in medical malpractice or ordinary negligence. If her claims sound in medical malpractice, then they are barred by the two-year statute of limitations applicable to medical malpractice actions and defendant is entitled to summary disposition under MCR 2.116(C)(7). If her claims sound in ordinary negligence, then they are timely. The Court of Appeals held that it could not "conclude solely on the basis of the allegations in the complaint . . . that plaintiff's claims sounded in medical malpractice."[1] It then remanded for an evidentiary hearing to determine whether plaintiff's claims sounded in medical malpractice, ordinary negligence, or both. We disagree with this approach. We hold that under the facts of this case, in which the only material submitted to the trial

[1] *Trowell v Providence Hosp & Med Ctrs, Inc*, 316 Mich App 680, 702; 893 NW2d 112 (2016).

court was plaintiff's complaint, the remand was improper and in determining the nature of plaintiff's claims, the lower courts' review was limited to the complaint alone. A proper review of the allegations in plaintiff's complaint leads us to conclude that although the complaint includes some claims of medical malpractice, it also contains one claim of ordinary negligence. Accordingly, we reverse the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff brought the present lawsuit on February 11, 2014, after sustaining injuries at defendant hospital. Three years earlier, on February 11, 2011, plaintiff was admitted to the intensive care unit (ICU) at defendant hospital after an aneurysm caused her to suffer a stroke and subsequently go into cardiac arrest. While in the ICU, she needed assistance to use the restroom. Her complaint alleges that an aide named Dana, acting alone, tried to move her to the bathroom and dropped plaintiff twice during the process. Specifically, the complaint alleges:

> 11. Although "Dana" was tasked with assisting Plaintiff with using the bathroom, she dropped Plaintiff, which caused Plaintiff to hit her head on her wheelchair.
>
> 12. "Dana" attempted to assist Plaintiff again after dropping her, but instead she dropped Plaintiff a second time.
>
> 13. As a result of her falls, Plaintiff suffered a torn rotator cuff which has required multiple surgeries, and treatment continues into the present time.
>
> 14. Further, an MRI revealed that Plaintiff had suffered bleeding on the brain as a result of being dropped by Defendant's nurse, "Dana."

> 15. Defendant hospital was negligent in one or more of the following particulars, departing from the standard of care in the community:
>
> a. Failure to ensure the safety of Plaintiff while in Defendant's hospital;
>
> b. Failure to properly supervise the care of Plaintiff while in Defendant's hospital;
>
> c. Failure to provide an adequate number of nurses to assist Plaintiff while in Defendant's hospital;
>
> d. Failure to properly train "Dana" and other nurses in how to properly handle patients such as Plaintiff;
>
> e. Failure to exercise proper care to prevent Plaintiff from being injured while in Defendant's hospital[.]
>
> 16. Defendant hospital was negligent through its agents, employees, and staff in failing to ensure the safety of Plaintiff.
>
> 17. The negligence of Defendant and its agents, employees and staff was the proximate [cause] of Plaintiff's damages set forth below.

On January 9, 2015, after the parties had the opportunity to engage in more than 10 months of discovery but before discovery closed, defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(8), arguing that plaintiff's claims sound in medical malpractice and thus are barred by the two-year statute of limitations applicable to medical malpractice claims.[2] That period is tolled when a plaintiff serves the defendant with a notice of intent to sue,[3] which is required by MCL 600.2912b(1). But in this case, plaintiff never served a notice of intent to sue, and consequently the limitations period was never tolled.[4] Thus,

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[2] See MCL 600.5805(8).

[3] MCL 600.5856(c).

[4] Defendant also alleged that plaintiff had failed to file an affidavit of merit, MCL 600.2912d(1), which is another procedural prerequisite of a medical malpractice suit.

according to defendant, the complaint was untimely because it was filed more than two years after the claims accrued. In response, plaintiff argued that her complaint does not allege medical malpractice claims, but instead alleges ordinary negligence claims.

The trial court granted summary disposition to defendant on April 8, 2015, holding that plaintiff's claims sound in medical malpractice, not ordinary negligence, because the claims involve a professional relationship between plaintiff and defendant and concern questions of defendant's medical judgment.[5]

The Court of Appeals reversed and remanded.[6] Its analysis was based on the distinctions between medical malpractice and ordinary negligence claims set forth by this Court in *Bryant v Oakpointe Villa Nursing Ctr, Inc*.[7] In applying *Bryant*, the Court of Appeals noted that it was "confined to examining the allegations in plaintiff's complaint," but the "complaint is fairly vague and lacks elaboration in terms of describing and factually supporting the particular theories of negligence it sets forth, ostensibly because plaintiff was short on information concerning details of the incident . . . ."[8] The Court observed that, based on the language of plaintiff's complaint, all of plaintiff's allegations could involve matters of medical judgment in

[5] Plaintiff subsequently filed a motion for reconsideration and a motion to file an amended complaint. The proposed complaint changes the title of the sole count from "medical negligence" to "negligence." It also drops all but one of the claims made in ¶ 15 of the original complaint, keeping only the allegation that defendant hospital was negligent in "[failing] to ensure the safety of Plaintiff while in Defendant's hospital." The trial court denied these motions.

[6] *Trowell*, 316 Mich App at 703.

[7] *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004).

[8] *Trowell*, 316 Mich App at 695.

the course of a professional relationship with defendant and thus constitute medical malpractice claims.[9] But the Court thought that plaintiff's allegations could also be consistent with factual scenarios involving ordinary negligence. The Court determined that, without additional evidence, it was impossible to discern the nature of plaintiff's claims.[10] Accordingly, the Court of Appeals reversed the trial court's order granting summary disposition to defendant and remanded to the trial court for further factual development of the nature of plaintiff's claims as pleaded in her complaint.[11]

Citing *Bryant*, we ordered oral argument on defendant's application for leave to appeal, directing the parties to address "whether the claims in the plaintiff's complaint sound in ordinary negligence or medical malpractice[.]"[12]

II. STANDARD OF REVIEW

Whether a claim sounds in ordinary negligence or medical malpractice is a question of law that is reviewed de novo.[13]

III. ANALYSIS

A medical malpractice claim is sometimes difficult to distinguish from an ordinary negligence claim.[14] But

[9] *Id*. at 698, 700-701.

[10] *Id*. at 702.

[11] *Id*. at 702-703.

[12] *Trowell v Providence Hosp & Med Ctrs, Inc*, 500 Mich 965 (2017).

[13] *Bryant*, 471 Mich at 419.

[14] See, e.g., *Chase v Sabin*, 445 Mich 190, 197; 516 NW2d 60 (1994) ("While the plaintiff's claim [against the hospital] lies in negligence, the essence of the hospital's alleged wrong is substantially similar to medical malpractice."), reversed on other grounds by *Trentadue v Buckler Lawn Sprinkler Co*, 479 Mich 378, 392-393; 738 NW2d 664 (2007).

the distinction is often critical.[15] In this case, defendant contended in its motion for summary disposition brought under MCR 2.116(C)(7) and (C)(8) that while plaintiff framed her claims as a "general negligence action," they "actually sound in medical malpractice" and are barred by the applicable statute of limitations. Plaintiff has argued that her claims are for ordinary negligence.

The Court of Appeals concluded in this case that "the allegations in the complaint did not lend themselves to a definitive determination that the negligence claims in plaintiff's suit necessarily sounded in medical malpractice," and the panel therefore remanded to the trial court for further proceedings.[16] Defendant disagrees with this approach, arguing that because it moved for summary disposition under MCR 2.116(C)(7) and (C)(8), the court's review of "allegations in [plaintiff's] Complaint" was restricted "to the four corners of said Complaint." Implicit in this argument is the premise that a remand to the trial court is unnecessary because that court was limited to reviewing the complaint alone when deciding defendant's motion for summary disposition.

A court is permitted to consider materials outside the pleadings when deciding a motion under MCR 2.116(C)(7).[17] In contrast, "[o]nly the pleadings may be

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[15] See *Bryant*, 471 Mich at 422 (explaining how to determine whether a claim sounds in medical malpractice or ordinary negligence and noting that medical malpractice claims are subject to certain substantive and procedural requirements).

[16] *Trowell*, 316 Mich App at 683.

[17] See MCR 2.116(G)(5) and (G)(6). See also *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994) (noting that in deciding a motion under MCR 2.116(C)(7), "the contents of the complaint must be accepted as true unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant").

considered when the motion [for summary disposition] is based on subrule (C)(8) . . . ."[18] We need not decide in this case whether the trial court was required to look only to the complaint in reviewing defendant's motion or whether it could have looked to other submitted evidence in ascertaining the nature of plaintiff's claims. This is because, under MCR 2.116(G)(5), "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence *then filed in the action or submitted by the parties*, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)."[19] In this case, neither party submitted materials beyond the complaint concerning the nature of the claims, and thus review is properly limited to the complaint alone, regardless of whether defendant's motion is examined under the standards applicable to (C)(7) motions, (C)(8) motions, or some combination of both standards.[20]

The Court of Appeals therefore erred by ordering further discovery to determine the nature of plaintiff's claims, which must be ascertained from the complaint itself under the facts of this case. As with any such review of a complaint, "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant."[21] And we disregard the labels given to the claims and instead read the complaint as a whole, seeking the gravamen of the claims.[22]

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[18] MCR 2.116(G)(5).

[19] Emphasis added.

[20] See *Patterson*, 447 Mich at 432 ("A motion under MCR 2.116(C)(7) *may* be supported by affidavits, depositions, admissions, or other documentary evidence.").

[21] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[22] *Altobelli v Hartmann*, 499 Mich 284, 303; 884 NW2d 537 (2016).

IV. APPLICATION

The question remains as to what theory (or theories) plaintiff's complaint actually sounds in. The Court of Appeals identified two claims in plaintiff's complaint—"(1) the use of one nurse's aide to assist plaintiff and not two aides or nurses and (2) the manner in which the nurse's aide physically handled plaintiff when providing assistance, regardless of the number of hospital personnel involved."[23] Regarding the second claim, the Court of Appeals further distinguished the first time the aide dropped plaintiff from the second time the aide dropped plaintiff. The Court explained that the second drop was potentially distinguishable because under *Bryant*, the failure to take corrective action once a risk is evident does not implicate medical judgment.[24] The Court of Appeals remanded the two claims for further factual development to determine whether they sound in ordinary negligence or medical malpractice. In addition to the claims identified by the Court of Appeals, two other claims are apparent in plaintiff's complaint: the "failure to properly supervise" and the "failure to properly train."[25] We will address each claim in turn.

With regard to the second drop of plaintiff, our Court considered an almost identical situation in *Bryant*. In that case, the hospital staff found the plaintiff tangled in her bedding.[26] After discovering this dangerous

[23] *Trowell*, 316 Mich App at 696-697.

[24] See *Bryant*, 471 Mich at 430-431.

[25] These two claims are distinguishable from the two categories identified by the Court of Appeals because the failure to train and the failure to supervise concern the hospital's direct liability. By contrast, the failure to use two or more nurses and the failure to properly assist plaintiff both concern the hospital's vicarious liability for the aide's negligence.

[26] *Bryant*, 471 Mich at 430.

condition, the staff failed to take corrective action to prevent the condition from recurring.[27] We held that this failure to take corrective action did not implicate medical judgment.[28] We explained:

> This claim sounds in ordinary negligence. No expert testimony is necessary to determine whether defendant's employees should have taken *some* sort of corrective action to prevent future harm after learning of the hazard. The fact-finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges.[29]

Our Court also offered the following hypothetical scenario:

> Suppose, for example, that two CENAs [certified evaluated nursing assistants] employed by defendant discovered that a resident had slid underwater while taking a bath. Realizing that the resident might drown, the CENAs lift him above the water. They recognize that the resident's medical condition is such that he is likely to slide underwater again and, accordingly, they notify a supervising nurse of the problem. The nurse, then, does nothing at all to rectify the problem, and the resident drowns while taking a bath the next day.[30]

In such a scenario, we explained, a jury relying on common knowledge and experience could determine whether the defendant was negligent for failing to take corrective action in response to a known danger.[31] Thus, a claim based upon such a scenario sounds in ordinary negligence rather than medical malpractice.

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[27] *Id*.

[28] *Id*.

[29] *Id*. at 430-431.

[30] *Id*. at 431.

[31] *Id*.

Plaintiff's claim in this case regarding the second drop is analogous to the situation in *Bryant*. As in *Bryant*, the nurse's aide in this case discovered a danger when she attempted to move plaintiff and dropped her. After discovering this danger, the aide failed to take corrective action, such as calling for assistance or retrieving additional equipment to aid in moving plaintiff. Instead, the aide attempted the same action that had already failed and caused plaintiff injury—she tried again to move plaintiff unassisted. Like the situation described in *Bryant*, the aide in this case "recognize[d] that the resident's medical condition is such that [she] is likely to [fall] again,"[32] but the aide nevertheless failed to take corrective action. Plaintiff's complaint with regard to the second drop, viewed "in a light most favorable to the nonmovant,"[33] sets forth a claim that a jury "relying only on common knowledge and experience"[34] could decide.

As for plaintiff's remaining claims, however, each sounds in medical malpractice. When we considered similar claims, both in *Bryant* and in *Dorris v Detroit Osteopathic Hosp Corp*,[35] on which *Bryant* relied, we determined that such claims implicate medical judgment. Related to the failure to use more than one person to move plaintiff, *Dorris* considered a claim of inadequate staffing and held that "these allegations concerning staffing decisions and patient monitoring involve questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a

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[32] *Id*.

[33] *Maiden*, 461 Mich at 119.

[34] *Bryant*, 471 Mich at 431.

[35] *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999).

jury."[36] Similarly, in this case, plaintiff's claim that defendant failed "to provide an adequate number of nurses to assist Plaintiff while in Defendant's hospital" implicated medical judgment and thus sounded in medical malpractice.

Plaintiff's failure-to-properly-assist claim is analogous to the "failure to inspect" claim considered in *Bryant*. In *Bryant*, we held that the failure to recognize the risks of asphyxiation associated with a patient's bedding implicates medical judgment because it requires an individualized assessment of the patient's medical needs.[37] In the same way, in this case, we hold that the claim that the aide failed to properly assist plaintiff while she was in the ICU implicates medical judgment because it requires consideration of plaintiff's individualized medical needs.

Regarding plaintiff's allegation in the complaint that defendant failed "to properly supervise the care of Plaintiff while in Defendant's hospital," *Dorris* considered a similar claim in the context of a psychiatric ward and held that "[t]he ordinary layman does not know the type of supervision or monitoring that is required for psychiatric patients in a psychiatric ward."[38] Similarly, in this case, a jury could not determine, relying merely on "common knowledge and experience,"[39] what would constitute proper supervision for a patient like plaintiff, who was admitted to the ICU after suffering an aneurysm, a stroke, and cardiac arrest.

Finally, regarding plaintiff's allegation in the complaint that defendant failed "to properly train 'Dana'

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[36] *Id*. at 47.

[37] *Bryant*, 471 Mich at 429.

[38] *Dorris*, 460 Mich at 47.

[39] *Bryant*, 471 Mich at 423.

and other nurses in how to properly handle patients such as Plaintiff," *Bryant* considered a claim of failure to train hospital staff on how to avoid asphyxiation from improperly situated bedding.[40] We analogized to the failure-to-supervise claim in *Dorris* and held that assessing risks such as asphyxiation from bedding for purposes of proper supervision requires specialized knowledge of hospital bedding arrangements and of a patient's individual needs.[41] Thus, we held that the claim implicated medical judgment.[42] In this case, the same principles apply. To determine whether the hospital provided proper supervision in the ICU for a patient such as plaintiff, a jury would need to hear expert testimony regarding proper methods of moving a patient, as well as the patient's individualized needs. Thus, the claim implicates medical judgment and sounds in medical malpractice.

Having reached these conclusions, we again note, as we did in *Bryant*, that "in future cases of this nature, in which the line between ordinary negligence and medical malpractice is not easily distinguishable, plaintiffs are advised as a matter of prudence to file their claims alternatively as medical malpractice and ordinary negligence within the applicable period of limitations."[43]

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[40] *Id*. at 426.

[41] *Id*. at 427-428.

[42] *Id*. at 428.

[43] *Id*. at 432-433. In *Bryant*, we added:

> If the trial court thereafter rules that the claim sounds in ordinary negligence and not medical malpractice, and may thus proceed in ordinary negligence, and this ruling is subsequently reversed on appeal, the plaintiff will nonetheless have preserved the right to proceed with the medical malpractice cause of action by having filed in medical malpractice within the period of limitations. [*Id*. at 433 n 19.]

V. CONCLUSION

Under these facts, when the only material submitted to the court was plaintiff's complaint, the Court of Appeals erred by remanding this case for an evidentiary hearing to determine the nature of plaintiff's claims. When plaintiff's complaint is read properly, she has stated only one claim of ordinary negligence—the claim regarding the second drop. As stated in the complaint, the other claims sound in medical malpractice, and thus those other claims are time-barred. Accordingly, we reverse the Court of Appeals' judgment and remand to the trial court for proceedings consistent with this opinion.

MARKMAN, C.J., and ZAHRA, BERNSTEIN, and WILDER, JJ., concurred.

VIVIANO, J. (*concurring in result only*). I concur in the majority's holding, namely, that when determining the nature of plaintiff's claim, the lower courts' review was properly limited to the complaint alone. But I do not agree with the majority's reasoning and fear it will have negative consequences. I write to explain why.[1]

I. BACKGROUND

Defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(8), arguing that plaintiff's claims (1) sounded in medical malpractice and (2) were barred by the statute of limitations applicable to such claims.[2] In response, plaintiff did not contest the latter

[1] I also agree with the majority that, when read properly, plaintiff's complaint states only one claim of ordinary negligence—the claim regarding the second drop. So I will not address this issue further.

[2] See MCL 600.5805(8).

portion of the motion; instead, she argued that her complaint alleges ordinary negligence claims that are not time-barred. Thus, the only issue in dispute is the nature of the claims asserted in plaintiff's complaint, i.e., do they sound in medical malpractice or ordinary negligence?

But to resolve this question, a court must know what materials to consider—the pleadings alone, or the pleadings *and* the evidence submitted by the parties. The Court of Appeals treated the question of the nature of a claim as a factual issue and therefore remanded the case for evidentiary development. The majority in this Court purports to reject this approach and holds that a remand for further factual development is inappropriate because, in this particular case, defendant did not submit documentary evidence in support of its motion and plaintiff did not submit any with its response. The problem with this rationale, however, is that it implies that determining the nature of a claim can be converted into a factual issue whenever a party submits evidence on the matter. Thus, the majority, like the Court of Appeals, leaves the door open to determining the legal nature of a claim in a complaint by reference to the factual record.[3]

I believe the confusion in this case results from our decision in *Bryant v Oakpointe Villa Nursing Ctr, Inc*.[4] There, drawing on the standards set forth in *Dorris v Detroit Osteopathic Hosp Corp*,[5] we reiterated the test

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[3] Despite noting that defendant cited both MCR 2.116(C)(7) *and* (C)(8) in support of its motion for summary disposition, the Court of Appeals panel, like the majority here, only addressed the motion under MCR 2.116(C)(7). For the reasons below, I believe both rules are applicable to motions of this type.

[4] *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 684 NW2d 864 (2004).

[5] *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999).

for determining whether a claim sounds in medical malpractice: medical malpractice claims can only arise in the course of a professional relationship and necessarily raise questions involving medical judgment, whereas ordinary negligence claims raise issues within the realm of common knowledge and experience.[6]

Applying *Dorris* to the various theories alleged in the plaintiff's complaint, this Court in *Bryant* did not limit its review to the plaintiff's complaint. Instead, we considered the deposition testimony of the plaintiff's expert, an article the expert coauthored, and the testimony of certain other witnesses.[7] Indeed, at one point, we made an explicit reference to the record in making our determination.[8] Shortly after *Bryant* was decided, the Court of Appeals followed suit in a published opinion in *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*.[9] Notably, however, in *Gregory v Heritage Hosp*, the companion case to *Dorris*, this Court's review was limited to the allegations in the plaintiff's complaint.[10]

I believe that *Bryant* charted a wayward course that was followed in *Sturgis* and by the Court of Appeals panel in this case. I would reject this mode of analysis,

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[6] See *Bryant*, 471 Mich at 422, citing *Dorris*, 460 Mich at 45-46 (explaining that "*Dorris* is central to our analysis").

[7] *Bryant*, 471 Mich at 427-430.

[8] *Id*. at 429 ("It is clear from the record in this case . . . ."). We also stated in a footnote that "[t]he court must examine the particular factual setting of the plaintiff's claim in order to determine whether the circumstances—for example, the medical condition of the plaintiff or the sophistication required to safely effect the move—implicate medical judgment as explained in *Dorris*." *Id*. at 421 n 9.

[9] See *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 497-498; 708 NW2d 453 (2005) (reviewing documentary evidence and deposition testimony to determine whether the plaintiff's claim sounded in medical malpractice or ordinary negligence).

[10] *Dorris*, 460 Mich at 45-48.

which permits consideration of facts outside the pleadings to decide what claims a plaintiff is asserting. The nature of a claim does not depend on the sufficiency of the evidence; it depends on the sufficiency of the pleadings. As discussed below, I believe our court rules chart a simpler course for motions like the one at issue in this case. A court should address the question of whether the complaint sounds in medical malpractice or ordinary negligence under MCR 2.116(C)(8), because that rule is tailored to questions regarding the sufficiency of a pleading.[11] Once that task is accomplished, the court must then determine whether the claim or claims in the complaint were timely, a determination properly made under MCR 2.116(C)(7).

II. DETERMINING THE NATURE OF A CLAIM UNDER MCR 2.116(C)(8)

Defendant's motion for summary disposition in this case does not simply argue that the plaintiff's claim is time-barred. Rather, defendant's motion first seeks a determination of the nature of the claims that plaintiff has asserted, i.e., it argues that plaintiff's complaint sounds in medical malpractice, not ordinary negligence.[12] This is another way of saying that plaintiff's

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[11] In *Bryant*, 471 Mich at 419, we may also have created some confusion when we stated that "[*i*]*n determining whether the nature of a claim is ordinary negligence or medical malpractice*, as well as whether such claim is barred because of the statute of limitations, a court does so under MCR 2.116(C)(7)." (Emphasis added.) The italicized portion of this quotation, however, finds no support in the text of the court rule because MCR 2.116(C)(7) does not, by its terms, apply to a determination of the nature of a claim. For the reasons discussed in the text, I do not think this is a correct statement of the law in this area and would therefore disavow it.

[12] See *Belleville v Hanby*, 152 Mich App 548, 551; 394 NW2d 412 (1986) (noting, in a case determining the applicable statute of limitations, that a court must "see exactly what a party's complaint is before deciding whether it should be barred").

complaint does not state a claim for ordinary negligence. And to answer this question, the court must assess the complaint under MCR 2.116(C)(8), which permits motions for summary disposition on the ground that "[t]he opposing party has failed to state a claim on which relief can be granted."[13] Unlike motions under MCR 2.116(C)(7), "[o]nly the pleadings may be considered when the motion [for summary disposition] is based on subrule (C)(8) . . . ."[14]

The proper analysis of the nature of a plaintiff's claim, then, relies on basic pleading principles. We are "committed to the notice theory of pleading," which means that the function of the complaint is to provide the opposing party with notice of the claims being lodged against it.[15] Accordingly, our court rules require that a complaint provide "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend"[16] and that all claims against an opposing party arising out of those facts must be included in the complaint against that party.[17] Thus, our courts have historically held that "the gravamen of an action is

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[13] See also *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) ("A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.").

[14] MCR 2.116(G)(5).

[15] *Baker v Gushwa*, 354 Mich 241, 246; 92 NW2d 507 (1958); see also *Olson v Dahlen*, 3 Mich App 63, 72; 141 NW2d 702 (1966) ("[T]he function of the pleadings is to act as a guide rope, not as a snare or a hangman's noose.").

[16] MCR 2.111(B)(1); see also *Eberbach v Woods*, 232 Mich 392, 396; 205 NW 174 (1925) ("The purpose of a declaration is to inform the defendant of the nature of plaintiff's claim.").

[17] MCR 2.203(A).

determined by reading the complaint as a whole . . . ."[18] That is, we determine the nature of a claim by looking to what type of claim "the complaint sounds in."[19] As this Court has noted, "It is well accepted that in ruling on a statute of limitations defense the court may look behind the technical label that plaintiff attaches to a cause of action to the substance of the claim asserted."[20] And courts in this state and others have used this mode of analysis—examining the complaint to determine the nature of the claim—to decide whether a plaintiff has stated a claim of ordinary negligence or medical malpractice in cases involving the statute of

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[18] *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007); see also *Altobelli v Hartmann*, 499 Mich 284, 303; 884 NW2d 537 (2016) ("In considering the gravamen of plaintiff's complaint, we examine the entire claim, looking beyond procedural labels to determine the exact nature of the claim."); *Adkins v Annapolis Hosp*, 116 Mich App 558, 563; 323 NW2d 482 (1982) ("The gravamen of an action is determined by reading the claim as a whole."), citing *Smith v Holmes*, 54 Mich 104; 19 NW 767 (1884); 1 Am Jur 2d, Actions, § 7, p 824 ("As also stated, whether a claim sounds in tort or contract is determined by the nature and substance of the facts alleged in the pleadings."); 1A CJS, Actions, § 102, p 374 ("To determine the nature of an action, a court must examine and construe a complaint's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the complaint or the form of a pleading.").

[19] See, e.g., *Dennis v Robbins Funeral Home*, 428 Mich 698, 705; 411 NW2d 156 (1987) ("[T]he complaint sounds in negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress."); *Wheeler v Iron Co Rd Comm*, 173 Mich App 542, 544; 434 NW2d 188 (1988) ("Plaintiffs' complaint sounds in premises liability."); *Lockwood v Mobile Med Response, Inc*, 293 Mich App 17, 26; 809 NW2d 403 (2011) ("[P]laintiff's complaint sounds in medical malpractice, not ordinary negligence."); see also *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 771-772; 664 NW2d 185 (2003) (determining the nature of the claim by examining plaintiff's complaint).

[20] *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995).

limitations defense and the other statutory medical malpractice requirements.[21]

This makes sense. A plaintiff speaks through his or her complaint,[22] so what claims a plaintiff is asserting can only be determined by reference to the allegations in the complaint. The claim itself is simply "[a] statement

[21] See *Kambas v St. Joseph's Mercy Hosp of Detroit*, 389 Mich 249, 250-252; 205 NW2d 431 (1973) (examining the complaint to determine that certain allegations sounded in ordinary negligence, not medical malpractice, and thus the medical malpractice statute of limitations was inapplicable); *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 648-650, 654; 438 NW2d 276 (1989) (holding, after examining the complaint alone in a case deciding an MCR 2.116(C)(7) motion, that the plaintiff's complaint sounded in medical malpractice); *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (ED Mich, 1997) (holding that a complaint stated a claim for ordinary negligence, not medical malpractice, by examining the gravamen of the complaint alone); *Gunter v Laboratory Corp of America*, 121 SW3d 636, 639 (Tenn, 2003) (noting that "[t]o determine which limitations statute controls Gunter's [the plaintiff's] claim against the laboratory, we must first decide whether the claim sounds in medical malpractice or negligence" and looking to the complaint for this determination); *Weiner v Lenox Hill Hosp*, 88 NY2d 784, 787-788; 673 NE2d 914 (1996) (noting that "[t]o determine which Statute of Limitations governs plaintiff's claim against the Hospital, we must decide whether the claim sounds in medical malpractice or negligence," and holding, on the basis of an examination of the complaint, that "the complaint in this case sounds in negligence, not medical malpractice"); see also *Belleville*, 152 Mich App at 551 ("In determining which limitation period controls, the focus must be on the type of interest allegedly harmed. . . . The gravamen of an action is determined by reading the claim as a whole. . . . Further, this Court will look beyond procedural labels to see exactly what a party's complaint is before deciding whether it should be barred."); *Barnard v Dilley*, 134 Mich App 375, 378; 350 NW2d 887 (1984) ("The applicable period of limitation depends upon the theory actually pled when the same set of facts can support either of two distinct causes of action."). See also *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987) (noting that "[i]n determining the appropriate statute of limitation governing a case, we read the party's claim as a whole and look beyond the procedural labels to determine the exact nature of the claim," and looking to the complaint to determine that the claim was for ordinary negligence).

[22] See MCR 2.101(B) ("A civil action is commenced by filing a complaint with a court.").

that something yet to be proved is true," "[t]he assertion of an existing right," or "[a] demand for . . . a legal remedy to which one asserts a right[.]"[23] A claim "sounds" in a particular theory permitting recovery, such as tort or contract.[24] A plaintiff articulates a claim and the supporting legal theory in his or her complaint,[25] not in the evidentiary record.[26] Evidence outside the complaint, then, cannot be considered to determine the nature of plaintiff's claim; instead, those materials represent the factual support for the claim.[27]

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[23] *Black's Law Dictionary* (10th ed).

[24] *Id*. ("Sound" means "**1.** To be actionable (in) <her claims for physical injury sound in tort, not in contract> [and] **2.** To be recoverable (in) <his tort action sounds in damages, not in equitable relief>."); see also Garner, *A Dictionary of Modern Legal Usage*, p 818 (1995) ("This verb [sound] has a special legal sense, 'to be actionable (in).' E.g., . . . 'It is, of course, to the advantage of any lienor . . . to plead his claim as *sounding* not in contract but in tort.' ") (citation omitted).

[25] MCR 2.111(B)(1); see *Dacon v Transue*, 441 Mich 315, 330; 490 NW2d 369 (1992) ("To assert a *theory of liability*, MCR 2.111(B)(1) specifies that an allegation must 'state[ ] . . . the facts, without repetition, on which pleader relies,' and state 'the specific allegations necessary reasonably to inform the adverse party' of the pleader's claims.") (emphasis added).

[26] See *Davis v Kramer Bros Freight Lines, Inc*, 361 Mich 371, 376-377; 105 NW2d 29 (1960) (A cause of action, i.e., a claim, "means merely the pleaded concurrence of facts giving rise to the obligation sought to be enforced against the defendant. The plaintiff's statement of a cause of action must not be confused with his right to judgment. Whether judgment will ever result will depend upon the proof plaintiff offers in support of the cause he asserts . . . ."). Indeed, the court rules specify a narrow class of outside written instruments that must be attached to a pleading if a claim or defense is based on such a written instrument, see MCR 2.110(A) (defining "pleading" to include "complaint"), and those instruments can be considered part of the pleading itself. See MCR 2.113(F) (listing the various written instruments that must be attached to a pleading under certain circumstances and establishing that if attached the instruments are "part of the pleading for all purposes").

[27] Cf. MCR 2.302(B)(1) (permitting discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the *claim* or defense of the party seeking discovery or to the *claim* or defense of another party") (emphasis added).

As recognized by one scholar, under the principle of notice pleading a "court is compelled to ascertain the [legal] theory as best it can by scrutiny of the complaint[.]"[28] "[I]f the pleading is negative in this regard," that is, does not give notice of the legal theory, then "how can there be any proper ascertainment" of the theory?[29] It would work an injustice if the plaintiff's theory could develop and fluctuate without any formal amendments as the case progresses, thus making it necessary for the defendant to be on guard against all possible legal theories inherent in the complaint.[30] This would prevent defendants from relying on procedural defenses that ordinarily may be asserted in advance of trial.[31]

As amici curiae the American Medical Association and the Michigan State Medical Society point out, the requirement that the nature of claims be determined from the complaint has significant practical implications in the context of medical malpractice actions. Plaintiffs who file medical malpractice actions are required to serve a written notice of intent to sue 182

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[28] Millar, Civil Procedure of the Trial Court in Historical Perspective (1952), p 199.

[29] *Id*.

[30] *Id*. at 198 (noting that if "every statement of claim carries with it every possible theory which can find support in the facts alleged, or even of the facts to be proved," a defendant would have "to prepare on the law for eventualities which he may never be required to meet" and "[i]f he fails to be armed at all points, he may be unjustly overthrown by a wholly unexpected development in point of theory which he is not ready to answer").

[31] *Id*. at 199 (explaining that a rule that allows the theory to develop throughout the trial would undermine "the case where identification is required in advance of trial, as where it should become necessary to distinguish between a claim in contract and a claim in tort for the purpose of determining whether, under the State practice, there may be a preliminary attachment of property or the holding of a defendant to bail").

days prior to filing the action[32] and to file an affidavit of merit signed by a health professional.[33] The efficacy of these requirements would be undermined if a case could proceed to discovery, and possibly even a jury trial,[34] to determine if those requirements had to be met.

For these reasons, the nature of a plaintiff's claim—i.e., whether it is for medical malpractice or ordinary negligence—should be determined solely by reference to the allegations in the complaint. As with any such review of a complaint, "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant."[35] And we look beyond the labels given to the claims and instead read the complaint as a whole, seeking the gravamen of the claims.[36] This not only prevents "artful pleading,"[37] but also accounts for the risk that a party honestly, though "incorrectly[,] invoke[s] language that designates a claim as either medical malpractice or ordinary negligence, when the opposite is in fact true."[38]

In sum, when faced with a motion alleging untimely claims that requires a court to determine the nature of the claims in the complaint, the court must determine the nature of the claims solely by reference

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[32] MCL 600.2912b(1).

[33] MCL 600.2912d(1).

[34] See MCR 2.116(I)(3).

[35] *Maiden*, 461 Mich at 119; see also *Campos v Gen Motors Corp*, 71 Mich App 23, 26; 246 NW2d 352 (1976) (stating that the pleaded allegations must be taken as true when deciding what theory a complaint sounded in for purposes of deciding whether it was time-barred under the applicable statute of limitations).

[36] *Altobelli*, 499 Mich at 303.

[37] *Maiden*, 461 Mich at 135.

[38] *Szymborski v Spring Mountain Treatment Ctr*, 403 P3d 1280, 1285 (Nev, 2017).

to the complaint under MCR 2.116(C)(8).[39] Once that task is accomplished, the court must then determine whether the claim or claims in the complaint were timely, a determination properly made under MCR 2.116(C)(7).

III. DETERMINING WHETHER THE CLAIM IS BARRED UNDER MCR 2.116(C)(7) BY THE STATUTE OF LIMITATIONS

A statute of limitations is simply a " 'law that bars claims after a specified period; specif[ically], a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued.' "[40] This determination is properly made under MCR 2.116(C)(7), which, by its terms, applies to motions for summary disposition based on the "statute of limitations." The essence of such a motion is that the plaintiff's claim is

[39] As we noted in *Bryant*, 471 Mich at 432-433, "[when] the line between ordinary negligence and medical malpractice is not easily distinguishable, plaintiffs are advised as a matter of prudence to file their claims alternatively in medical malpractice and ordinary negligence within the applicable period of limitations." Plaintiffs who lack information prior to initiating a medical malpractice action can, in appropriate cases, resort to the doctrine of res ipsa loquitur to create an inference of negligence even in the absence of expert testimony. See *Woodard v Custer*, 473 Mich 1, 6-7; 702 NW2d 522 (2005). Defendants, too, have tools to address underdeveloped complaints that could sound in either medical malpractice or ordinary negligence. One is to "move for a more definite statement before filing a responsive pleading" if the "pleading is so vague or ambiguous that it fails to comply with the requirements of these rules." MCR 2.115(A). If a complaint for ordinary negligence turns out, after factual development, to involve only matters of medical judgment in the course of a professional relationship (i.e., the claim is provable only as a medical malpractice claim), the defendant could move for summary disposition under MCR 2.116(C)(10) on the basis that there is no factual dispute regarding the breach of an *ordinary* standard of care.

[40] *Frank v Linkner*, 500 Mich 133, 142; 894 NW2d 574 (2017), quoting *Black's Law Dictionary* (10th ed) (emphasis omitted; alteration in original).

untimely.[41] A defendant raising the statute of limitations must show that the plaintiff's claim is time-barred, whereas the plaintiff, to refute the defense, must prove "that his claim is timely."[42] In making this determination, the court may need to consider evidence submitted by the parties.[43] Factual disputes regarding timeliness thus fit squarely within MCR 2.116(G)(5), which requires consideration of the extrinsic evidence when deciding a motion under MCR 2.116(C)(7).

IV. PROBLEMS WITH THE MAJORITY'S APPROACH

While the majority concludes that it is unnecessary to reach the issue of whether the court may look beyond the complaint to determine its contents, the majority's analysis treats this issue as a fact question. But if the nature of a plaintiff's claim can be deter-

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[41] See generally *Palenkas v Beaumont Hosp*, 432 Mich 527, 550; 443 NW2d 354 (1989) (discussing the burdens of proof regarding statute of limitations defenses, focusing on whether the claim is timely or not); *Lothian v Detroit*, 414 Mich 160, 165, 168; 324 NW2d 9 (1982) (noting that "[a] statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action" and that "[l]aches differs from the statutes of limitation in that ordinarily it is not measured by the mere passage of time"); *Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974) (noting that purposes of statutes of limitations include " 'compel[ling] the exercise of a right of action within a reasonable time' " and preventing stale claims) (citation omitted); 54 CJS, Limitations on Actions, § 2, p 18 ("The essential attribute of a statute of limitations is that it establishes a reasonable time within which an action may be brought on causes of action which it affects. . . . A statute of limitations fixes a time beyond which the courts generally cannot entertain a cause of action[.]").

[42] *Palenkas*, 432 Mich at 550.

[43] See Wright & Miller, 5 Federal Practice & Procedure (3d ed), § 1277, p 642 (observing that even when a complaint appears time-barred on its face, "there may be facts tolling the running of the statute, such as by equitable estoppel, that do not appear in the complaint, which means that the motion to dismiss [as untimely] might be premature").

mined with regard to evidence outside the complaint—and thus is a question of fact—it is hard to see why the Court of Appeals' remand in this case was improper. The majority focuses on the language of MCR 2.116(G)(5), particularly its directive that "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)." When MCR 2.116(G)(5) applies, the rule requires that a court consider all evidence then filed in deciding the motion. The majority, however, reads a prohibition into the rule—a court cannot order further factual development to decide the motion.

The majority, however, cites no support for this limitation on the court's ability to allow factual development of a fact question. The rule is one of inclusion, not exclusion. Nothing in the rule establishes that a court is prohibited from considering any evidence. Additionally, under the majority's approach, the factual record crystallizes without regard to whether discovery is complete or whether the court needs additional evidence to make its factual determination. This would be an odd, perhaps even singular, way to resolve factual issues and would disregard courts' general authority to require additional evidentiary development when deciding questions of fact.[44] And it is a rule we have never expressed in past cases. Indeed,

[44] See *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006) (stating that a trial court should not grant summary disposition before discovery is complete if further discovery could reveal factual support for the opposing party); MCR 7.216(A)(5) ("The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just . . . remand the case to allow additional evidence to be taken[.]"); MCR 7.316(A)(5) ("While a matter is pending in the Supreme Court, the Court may, at any time, in addition to its general powers . . . adjourn the case until further evidence is taken and brought before it[.]").

in cases dealing with motions subject to MCR 2.116(G)(5), we have done the opposite, i.e., remanded "for further development of the factual record through discovery or, if appropriate, for amendment of the pleadings."[45]

Further, reading MCR 2.116(G)(5) to prohibit factual development also ignores that summary disposition will often be premature without sufficient factual development. As a general rule, courts will not decide motions for summary disposition before the end of discovery on a disputed issue unless there is no reasonable chance that discovery will uncover factual support for the nonmoving party's position.[46] Indeed, the Court of Appeals has recognized that, although courts reviewing motions under MCR 2.116(C)(7) must consider the evidence listed in MCR 2.116(G)(5), "if a question of fact exists so that factual development could provide a basis for recovery, caselaw states that dismissal without further factual development is inappropriate."[47]

The majority also fails to grapple with the implications of MCR 2.116(I)(3). That rule expressly allows for immediate trial on disputed issues of fact involving MCR 2.116(C)(7) motions:

> A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined

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[45] *CC Mid West, Inc v McDougall*, 470 Mich 878 (2004) (addressing an MCR 2.116(C)(4) motion challenging jurisdiction and noting explicitly that MCR 2.116(G)(5) applied to that motion).

[46] See *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010); see also MCR 2.116(H) (permitting a party to oppose a motion by showing by affidavit that the facts necessary to support a party's position cannot be presented because they have not yet been procured).

[47] *Dextrom*, 287 Mich App at 431.

> by the court. An immediate trial may be ordered if the grounds asserted are based on subrules (C)(1) through (C)(6), or if the motion is based on subrule (C)(7) and a jury trial as of right has not been demanded on or before the date set for hearing. If the motion is based on subrule (C)(7) and a jury trial has been demanded, the court may order immediate trial, but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury.[48]

The fact that the rules explicitly provide for a trial on factual issues related to motions brought under MCR 2.116(C)(7) strongly indicates that MCR 2.116(G)(5) is not a prohibition on evidentiary development.[49]

In this case, discovery is not complete, and plaintiff has not even been able to depose the aide responsible for transporting plaintiff—and the aide was most likely the central witness in the case.[50] Under the majority's reasoning, the court is prevented from considering the aide's testimony simply because defendants successfully filed their motion for summary disposition before

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[48] MCR 2.116(I)(3).

[49] It would be rather astounding if a trial could be held to determine the nature of a claim as pleaded in a complaint. Yet if the majority is correct that this is a fact question, such trials are necessarily permissible. The majority fails to address this puzzling result.

[50] Plaintiff's counsel argued at the April 2015 hearing on the motion for summary disposition:

> In this case, I don't even know, because we haven't had a chance to depose Ms. McCorkle (ph), whose nurse—who apparently dropped my client, that whether she was a nurse or a nurse's aide or exactly what her position was. . . .
>
> [W]e pled a number of things as defendant—I'm sorry, a number of theories as defendant stated; however, we haven't been able to complete discovery to find out exactly which theory applies. They don't know if it was because two nurses were supposed to have assisted, whether the nurse in question just wasn't able to physically assist her, what the circumstances were that caused her to drop her.

discovery could be completed. In effect, the majority's analysis creates a game of musical chairs, where parties will rush to file motions for summary disposition in order to freeze discovery on the issue. Recognizing that the nature of a claim must be determined by the nature of the complaint alone both comports with the pleading principles discussed above and avoids such an odd outcome.

It is hard to understand how evidence outside the pleadings can help a court determine what claims the plaintiff has asserted in the complaint. In our system, the plaintiff gets to decide what facts to allege and what legal theories of recovery to assert.[51] The pleadings can be amended in appropriate circumstances,[52] but their meaning cannot be retroactively altered by evidence.

V. CONCLUSION

Accordingly, I would hold that the Court of Appeals erred by remanding for further factual development rather than deciding the nature of plaintiff's claims by reference to the complaint alone.

MCCORMACK and CLEMENT, JJ., concurred with VIVIANO, J.

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[51] *The Fair v Kohler Die & Specialty Co*, 228 US 22, 25; 33 S Ct 410; 57 L Ed 716 (1913) (Holmes, J.) ("Of course the party who brings a suit is master to decide what law he will rely upon . . . ."). See also *Alexander v Electronic Data Sys Corp*, 13 F3d 940, 943-944 (CA 6, 1994) (asserting in the context of the well-pleaded complaint rule that "the plaintiff is the master of his complaint").

[52] See MCR 2.118.

PEOPLE v JOHNSON

PEOPLE v SCOTT

Docket Nos. 154128 and 154130. Argued April 11, 2018 (Calendar No. 2). Decided July 23, 2018.

In Docket No. 154128, Justly E. Johnson was convicted following a bench trial in the Wayne Circuit Court, Prentis Edwards, J., of first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, and carrying or possessing a firearm when committing or attempting to commit a felony, MCL 750.227b. In Docket No. 154130, Kendrick Scott was convicted following a jury trial in the Wayne Circuit Court, Prentis Edwards, J., of the same offenses as Johnson. On the evening of May 8, 1999, the victim, her husband, and the victim's three children, including Charmous Skinner Jr. (Skinner), who was 8 years old at the time, went to see a movie at a drive-in theater. On the way home, the family stopped at a house on the east side of Detroit. The victim, who was driving, waited in the van with the children while her husband went inside. While inside, her husband heard a noise, which turned out to be gunfire, and he went to the front door just in time to see both the victim's van speeding away and a man fleeing on foot. The victim, who had been struck in the chest by a single gunshot, drove the van to a nearby gas station, where she stopped and collapsed out of the vehicle. She later died at the hospital. Two individuals who were in the same neighborhood at the time of the crime, Antonio Burnette and Raymond Jackson, implicated defendants in the shooting and testified at both trials. Both defendants were convicted, and both defendants appealed in the Court of Appeals. The Court of Appeals affirmed Johnson's convictions, and the same Court of Appeals panel vacated on double-jeopardy grounds Scott's conviction of assault with intent to rob while armed but otherwise affirmed his convictions and sentences. Defendants sought leave to appeal in the Supreme Court, and the Supreme Court denied both applications. Johnson subsequently filed three motions for relief from judgment. In his second motion for relief from judgment, Johnson presented, as a claim of newly discovered evidence, a recantation by Burnette and an affidavit signed

by one of Jackson's relatives indicating that Jackson lied at the trials. The trial court denied the motion, and the Court of Appeals and the Supreme Court denied leave to appeal. In his fourth motion for relief from judgment, Johnson asserted as a claim of newly discovered evidence that Skinner could attest that neither defendant was the shooter. The trial court denied the motion without a hearing. Johnson appealed in the Court of Appeals, and the Court of Appeals denied relief in an unpublished order entered May 30, 2013 (Docket No. 311625). Scott also filed his first and only motion for relief from judgment, raising the same claim concerning Skinner along with the claims of newly discovered evidence that Johnson had made in his previous motions for relief from judgment. The trial court also denied Scott's motion without a hearing. Scott sought leave to appeal in the Court of Appeals, and the Court of Appeals denied relief in an unpublished order entered November 5, 2013 (Docket No. 317915). Both defendants sought leave to appeal in the Supreme Court, and the Supreme Court remanded the cases to the Court of Appeals for consideration as on leave granted, directing the Court of Appeals to first remand the cases to the trial court for an evidentiary hearing. *People v Johnson*, 497 Mich 897 (2014); *People v Scott*, 497 Mich 897 (2014). The Court of Appeals consolidated the cases and remanded to the trial court, retaining jurisdiction. At the evidentiary hearing, Skinner testified that he remembered the shooter's face and that the shooter's facial characteristics did not match those of either defendant. Burnette also testified at the evidentiary hearing, recanting much of the testimony he had given at defendants' trials. Additionally, although Jackson had died in 2008, his cousin testified that Jackson told her that he had lied on the stand. The trial court, James A. Callahan, J., denied both defendants' motions for relief from judgment, concluding that there was no reasonable probability of a different result if Skinner testified on retrial. The trial judge stated that Skinner, then 8 years old, would have been asleep in the car and could not have witnessed the shooting or, alternatively, if Skinner had not been asleep, he would not have been capable of seeing anyone outside the vehicle in the dark. The trial judge also questioned Skinner's overall credibility because Skinner had previously been convicted of perjury in an unrelated matter. Finally, the trial judge stated that he found it difficult to believe that Skinner could remember what the assailant looked like when the judge himself had difficulty remembering what his deceased relatives looked like. With regard to Burnette's and Jackson's testimony, the trial court stated that the testimony had been consistent on four different occasions. Defendants moved for peremptory reversal,

and the Court of Appeals, STEPHENS, P.J., and FORT HOOD, J. (WILDER, J., dissenting), denied the motion. The Court of Appeals, SAAD and O'BRIEN, JJ. (SERVITTO, J., concurring), then affirmed the trial court's ruling in an unpublished per curiam opinion, issued May 31, 2016 (Docket No. 311625). Although the Court of Appeals disagreed with the trial court's factual finding that Skinner had to have been asleep at the time of the shooting, the Court of Appeals nevertheless found that the trial court did not clearly err by finding Skinner's testimony unreliable. Furthermore, the Court of Appeals held that the recantations were not part of the Supreme Court's remand order and that the trial court had thus erred by considering these other claims. Even if the recantations could be considered, the Court of Appeals held that the trial court correctly determined that the recantations lacked any substantive weight. Defendants each sought leave to appeal in the Supreme Court, and the Supreme Court granted leave in both cases, ordering that the cases be argued together. *People v Johnson*, 501 Mich 914 (2017); *People v Scott*, 501 Mich 914 (2017).

In an opinion by Justice BERNSTEIN, joined by Chief Justice MARKMAN and Justices VIVIANO and CLEMENT, the Supreme Court *held*:

The newly discovered evidence of Skinner's testimony in conjunction with the other evidence that would be presented on retrial would make a different result probable and therefore entitled both defendants to new trials. Accordingly, the Court of Appeals judgment was reversed in part and the cases were remanded to the Wayne Circuit Court for new trials.

1. MCR 6.508(D)(3) provides that a court may not grant relief to a defendant if the motion alleges grounds for relief that could have been previously raised, unless the defendant demonstrates both good cause for failing to raise such grounds earlier as well as actual prejudice. In this case, the claim of newly discovered evidence pertaining to Skinner's eyewitness account could not have been raised on appeal from defendants' convictions or in a prior motion for relief from judgment because defendants did not know that Skinner saw the shooting until 2011. Therefore, MCR 6.508(D)(3) did not bar the claims regarding Skinner's account.

2. In order for a new trial to be granted on the basis of newly discovered evidence, a defendant must show that (1) the evidence itself, not merely its materiality, was newly discovered, (2) the newly discovered evidence was not cumulative, (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial, and (4) the new evidence makes a different

result probable on retrial. In this case, it was undisputed that defendants satisfied their burden under the first three factors; therefore, the issue was whether the newly discovered evidence in the form of Skinner's testimony would make a different result probable on retrial. To determine whether newly discovered evidence makes a different result probable on retrial, a trial court must first determine whether the evidence is credible. If the court determines that a reasonable juror could have found the newly discovered evidence to be credible, the court then considers the impact of that evidence in conjunction with the evidence that would be presented on retrial.

3. In determining whether newly discovered evidence is credible, the trial court should consider all relevant factors tending to either bolster or diminish the veracity of the witness's testimony. A trial court's function is limited when reviewing newly discovered evidence, as it is not the ultimate fact-finder; should a trial court grant a motion for relief from judgment, the case would be remanded for retrial, not dismissal. A trial court's credibility determination is concerned with whether a reasonable juror could find the testimony credible on retrial. If a witness's lack of credibility is such that no reasonable juror would consciously entertain a reasonable belief in the witness's veracity, then the trial court should deny a defendant's motion for relief from judgment. However, if a witness is not patently incredible, a trial court's credibility determination must bear in mind what a reasonable juror might make of the testimony, and not what the trial court itself might decide were it the ultimate fact-finder. In this case, the trial court found that Skinner was not a credible witness. The trial court's finding that Skinner could not have witnessed the shooting because Skinner must have been asleep was not rooted in anything in the record, and therefore the trial court clearly erred by finding that Skinner had been asleep during the shooting. The trial court also clearly erred to the extent that the trial judge supported his finding that Skinner could not possibly remember the shooter's face on the basis of the judge's own ability to remember the faces of his deceased relatives. Because the focus is on whether a reasonable juror could credit Skinner's testimony, the trial judge's focus on his own personal gaps in memory was inappropriate. Moreover, the trial court failed to acknowledge the expert testimony of a psychologist, who testified that it would not be impossible for a child of Skinner's age to recall specific details from a traumatic event several years later. The trial court additionally found that Skinner was not credible because Skinner could not have seen the shooter; however, the trial court failed to consider whether a

reasonable juror could have believed that, depending on the angle of approach, the darkness of the street, and the lighting conditions in the car, Skinner might have been able to make out defining characteristics of the shooter's face. Furthermore, although it was appropriate for the trial court to take into account Skinner's prior perjury conviction, that conviction was obtained under circumstances very different from the case at hand, and a reasonable juror could have credited the fact that Skinner lacked any motive to lie in this case. When considering Skinner's testimony in its entirety, it was clear that his testimony was not wholly incredible and that a reasonable juror could find his testimony worthy of belief on retrial. Therefore, the trial court clearly erred when it concluded that Skinner's testimony was entirely incredible.

4. In examining whether newly discovered evidence makes a different result probable on retrial, the trial court must consider the evidence that was previously introduced at trial. The trial court must also consider the evidence that would be admitted at retrial. In this case, the trial court failed to properly assess the effect of the newly discovered evidence in conjunction with the evidence that was presented at the original trials. Skinner testified that neither defendant was the shooter, identifying physical characteristics of the shooter that were completely contrary to the physical characteristics of both defendants, and this testimony was only strengthened when considered in conjunction with the evidence presented at the previous trials. Additionally, the trial court judge who presided over the motions for relief from judgment was not the same judge who presided over the preliminary examination or the original trials and therefore was functionally in the same position as an appellate court where the credibility of witnesses at the preliminary examination and the original trials was concerned; accordingly, the trial court's determination that Burnette's trial testimony was credible did not need to be afforded any deference. Furthermore, the trial court's finding that Burnette's previous testimony was consistent and compelling was not supported by the record: the prosecutor had to repeatedly refresh Burnette's memory at both Johnson's trial and at the preliminary examination, there were significant inconsistencies between the testimonies Burnette gave at the two different trials, and Burnette was unable to give a coherent time line as to what happened on the night in question. Moreover, the trial court failed to note that Burnette's and Jackson's testimonies conflicted with one another and that both witnesses admitted to consuming copious amounts of alcohol and marijuana during the times that defendants purportedly

made incriminating statements. Accordingly, the Court of Appeals erred by failing to examine the evidence presented at the original trials. When Skinner's testimony is considered in conjunction with the other evidence presented at the original trials, a different result is reasonably probable on retrial.

5. While consideration of Skinner's testimony alone would make a different result probable on retrial due to the weaknesses of the prosecutor's witnesses, the evidence that would be presented at retrial may be considered, which included Burnette's and Jackson's recantation testimony. Even though Johnson already raised the recantation evidence in a prior motion for relief from judgment, and therefore was barred from raising the recantations as an independent ground for relief, the court rules do not prohibit considering this evidence in the context of the claim that Skinner's testimony would make a different result probable on retrial. The Court of Appeals erred by holding that the recantation evidence was not part of the Supreme Court's remand order. In considering the weight of these recantations, the trial court was correct to approach the recantations with suspicion. However, given the inherent weakness of Burnette's prior testimony at the trials, his recantation should not be viewed with as much suspicion as is generally accorded, and without his testimony, there is scant other evidence to establish that defendants committed the crime. Also, while Jackson's trial testimony was not inherently as weak as Burnette's trial testimony, it was also not as material as Burnette's trial testimony. Therefore, the recantation testimony supported the conclusion that a different result is probable on retrial.

Court of Appeals judgment reversed in part; cases remanded to the trial court for new trials.

Justice ZAHRA, dissenting, would have held that the trial court did not clearly err by determining that Skinner's testimony was not credible. The trial court did not fail to properly assess the effect of the newly discovered evidence in conjunction with the evidence that was presented at the original trials. Contrary to the majority's assertion, Judge Callahan, who was the judge presiding over the postjudgment matters in defendants' cases, did not position himself as an appellate court where the credibility of witnesses at the preliminary examination and the original trials was concerned. The majority failed to give regard to the special opportunity the circuit court judge (Judge Edwards) and the district court judge had to assess and weigh the credibility of the witnesses who appeared before them. Judge Edwards found that the witnesses, particularly Burnette, were fearful and attempted to tailor their testimony to provide Johnson an alibi. Because of

this, Judge Edwards rightly rejected this equivocating and inconsistent aspect of the witnesses' testimony. Judge Callahan relied on four reasons to conclude that Skinner was not credible: (1) Skinner was only 8 years old at the time of the murder and his memory some 16 years later could not be certain; (2) it would have been incredibly difficult for Skinner to be inside a car at night and see someone outside the vehicle when the only illumination was from the vehicle's interior dome light, especially when considering that both the victim and the car door were between Skinner and the shooter; (3) Skinner had already been convicted for perjury; and (4) in any event, Skinner likely would have been asleep inside the car at the time of the murder. The first three of these four findings clearly called Skinner's credibility into question and were not clearly erroneous; accordingly, Justice ZAHRA would have held that Judge Callahan did not abuse his discretion by denying defendants a new trial. Additionally, even assuming that Skinner was credible, Skinner's testimony would not make a different result on retrial probable given the evidence that defendants made threats to Burnette and Jackson in connection with their testimony and that Judge Edwards found Burnette and Jackson to be credible. A comprehensive examination of the evidence presented at defendants' original proceedings demonstrated that Judge Edwards sifted through the testimony and discounted the arguably equivocal and inconsistent testimony, instead finding the circumstantial evidence against defendants to be persuasive. Accordingly, Justice ZAHRA would have held that the newly discovered evidence was not credible and that even assuming the evidence was credible, the evidence would not have made a difference on retrial.

Justice MCCORMACK did not participate because of her prior involvement in this case as counsel for a party.

Justice WILDER did not participate because he was on the Court of Appeals panel that decided defendants' motions for peremptory reversal.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *David A. McCreedy*, Lead Appellate Attorney, for the people.

Michigan Innocence Clinic (by *Imran J. Syed*, *David A. Moran*, and *Rebecca L. Hahn*) for defendants.

BERNSTEIN, J. In these consolidated cases, we consider whether the trial court erred by declining to grant new trials following defendants' motions for relief from judgment. After weighing the evidence presented at the trials along with defendants' claims of newly discovered evidence, we hold that the evidence in the form of testimony given by Charmous Skinner Jr. (Skinner) would make a different result probable on retrial. Accordingly, we reverse the judgment of the Court of Appeals in part and remand these cases to the trial court for new trials.[1]

I. FACTS AND PROCEDURAL HISTORY

These cases arise from the murder of Lisa Kindred. Between midnight and 1:00 a.m. on May 9, 1999, Lisa was shot and killed while in her vehicle with her three children—Decola (newborn), Shelby (2 years old), and Skinner (8 years old). Earlier in the evening, Lisa, her husband (William Kindred), and her three children had gone to see a movie, "Life," at a drive-in theater in Dearborn, Michigan. On their way home, William announced that he wanted to make a stop on the east side of Detroit to talk to his sister's boyfriend, Verlin Miller, about purchasing a motorcycle. Lisa, who was driving, parked their minivan across the street from Miller's home and waited in the van with the children while William went inside. At one point, Lisa went to the door of the house and asked William to come back to the van, but William told her that he would be out shortly, and Lisa returned to the van. Soon afterward, William heard a noise, which turned out to be gunfire, and went to the

[1] Our holding that defendants are entitled to new trials due to their newly discovered evidence claims makes it unnecessary to consider their ineffective assistance of counsel claims. Therefore, we vacate the Court of Appeals' analysis of those issues as moot.

front door just in time to see both Lisa's van speeding away and a man fleeing on foot. William chased after the fleeing individual but failed to catch him.

Having been struck by the gunfire, Lisa drove the van to a nearby gas station, stopped, and then collapsed out of the vehicle. She later died at the hospital. The medical examiner's report revealed that Lisa's death was caused by a single gunshot wound to the chest. The report also revealed that small wounds on her body were consistent with her having been shot through an intervening medium. The driver's window had been shattered, but nothing had been stolen from the van. The children were not harmed, and they were still in the vehicle when the police arrived at the scene. A .22 caliber spent casing was found in the street at the scene of the shooting.

Two individuals who were in the same neighborhood at the time of the crime, Antonio Burnette and Raymond Jackson, implicated defendants Justly Johnson and Kendrick Scott in the shooting.[2] All four individuals knew each other from the same neighborhood. Johnson and Scott were tried separately—Johnson by bench trial and Scott by jury trial. Judge Prentis Edwards presided over both trials. Burnette and Jackson testified at both trials.

A. JOHNSON'S BENCH TRIAL

In both trials, Burnette was the prosecutor's key witness. However, it is difficult to construct a linear

[2] Burnette testified at Scott's trial that he was 14 years old when the shooting occurred and was 15 years old at the time of the trial. However, at the evidentiary hearing, Burnette testified that he was born in 1982, which would have made him 16 or 17 years old when the shooting occurred and 17 or 18 years old at the time of the trial. Jackson was 22 years old at the time of the preliminary examination. Johnson was 24 years old at the time of the shooting, and Scott was 20 years old.

time line of events from the night of the shooting according to Burnette's testimony, given the many inconsistencies in his testimony. According to Burnette, he was initially with both defendants the evening before the shooting. Burnette testified that Scott had discussed "planning something" but that Johnson had not said anything. However, when the prosecutor pointed out that Burnette had previously testified at the preliminary examination that both defendants had discussed plans for that evening with him, Burnette agreed that such a conversation had occurred. Burnette also failed to recall whether defendants had mentioned planning to "hit[] a lick," which he explained meant robbing someone. The prosecutor refreshed Burnette's memory with his preliminary examination testimony, and Burnette then clarified that defendants had discussed hitting a lick.

Burnette then testified that his father picked him up at 10:30 p.m. Burnette claimed that he again met up with both defendants around 2:30 a.m., at which point Johnson told him that Scott had shot a lady because she owed Scott money. However, Burnette also testified that he and Johnson drove around with an individual named Mike at some point in the evening. It is unclear from Burnette's testimony whether this drive took place earlier in the evening, before Burnette's father picked him up and before the shooting, or whether it occurred after Burnette met up again with defendants at 2:30 a.m. Burnette testified that Mike drove Johnson and him around and that Mike eventually dropped them both off when their plans fell through. At one point during his testimony, Burnette stated that he was dropped off at the same gas station that Lisa drove to. Burnette also testified that he saw an ambulance and police vehicles at the gas station, suggesting that this took place after the shooting. However, Burnette's

testimony changed several times as to whether Johnson was with him when he saw the ambulance at the gas station. Burnette also testified that, alternatively, he was dropped off elsewhere in Detroit, that he did not return to the gas station, and that he did not see an ambulance there.

Burnette further testified that when he met up with both defendants at 2:30 a.m., all three of them were smoking and drinking. Burnette testified that he had consumed 32 bottles of Budweiser and a half-pint of Hennessy the day of the shooting, in addition to smoking 10 marijuana cigars. Burnette claimed that, while he was in this state, Johnson told him that Scott had shot a woman because she owed Scott money. Burnette also testified that he had first learned that a woman had been shot when he went to purchase marijuana earlier that evening and saw an ambulance and police officers in the neighborhood. It is unclear from Burnette's testimony whether this was related to his purported sighting of an ambulance and police officers at the gas station, or whether this was a separate incident. In any case, Burnette later contradicted himself yet again by stating that defendants were the ones who first informed him that someone had been shot.

Burnette also testified unclearly about whether his knowledge of the victim's name came from defendants or the police. Burnette agreed that, in his police statement, he stated that the woman who owed Scott money was named "Lisa." However, when Burnette was asked whether he knew anyone by that name, he testified that he did not. When he was asked if the police had given him that name, Burnette said that they had.

Burnette claimed that he saw both defendants with guns that night, an AK-47 and a .22 caliber rifle, albeit only after his memory was refreshed. Burnette testi-

fied that he saw Johnson place a gun in a vehicle and that Scott, sometime around 7:00 or 8:00 a.m. the morning after the shooting, placed the other gun in a different vehicle. Burnette went to sleep in Scott's car, where the police later found him. Burnette was taken in for questioning, and he testified that the police told him that he would be charged with a homicide offense.

Turning to Jackson's testimony, Jackson stated that, in the early morning hours on the day of the shooting, he woke up in his grandmother's home after hearing a gunshot.[3] When Jackson eventually went outside to see what had happened, he saw a police car in front of the field next door to his grandmother's house. Jackson testified that when he looked down the street, he saw Scott standing on his girlfriend's porch and saw Scott hand his girlfriend something long and covered in clothing. Jackson testified that he believed this object to be a dog leash. Shortly thereafter, the police took Jackson and Scott downtown for questioning, and Jackson said that he eventually returned home while the police kept Scott at the station. A police officer confirmed that Scott was still in custody when the officer reported to work between 8:00 and 8:30 a.m. that morning.

Sometime after Jackson returned to his grandmother's house, Johnson came over. Jackson alleged that Johnson was drunk when they spoke. But Jackson admitted that he, too, had consumed marijuana and three 40-ounce bottles of beer. It is unclear when, and in what time frame, Jackson consumed these substances. Jackson also acknowledged that he sometimes saw and heard things that were not there, that he was recently released from the hospital after being admit-

[3] Jackson's grandmother's house is across the street from Verlin Miller's home.

ted for mental health issues, and that he was taking prescription medications for his mental health conditions when the shooting occurred. In contrast to Burnette's testimony, Jackson testified that Johnson, not Scott, had admitted to "hit[ting] a lick" and that Johnson "messed up and had to shoot." However, Jackson clarified that the phrase "hit a lick" could mean a variety of things, only one of which was to rob someone.[4] Johnson also told Jackson that this occurred in the field next to Jackson's grandmother's home and that Scott was with him. Later, police arrived at Jackson's home and arrested Johnson. Sometime after Johnson's arrest, Jackson was held again at the police station. Jackson claimed that, while he was in custody, Johnson verbally threatened him for what he had told the police.

Like Burnette, Jackson's testimony also suffered from some inconsistencies, most notably whether Jackson was threatened by the police. On cross-examination, Jackson testified that the police had not threatened him. However, Jackson later testified that the second time he was at the police station, the police scared him, and he felt that if he did not come forward with "the truth," the police would try to pin the murder on him.

Johnson testified on his own behalf, denying any involvement in the shooting. Johnson testified that he met up with Scott and Burnette at Scott's home at around 9:30 p.m. the evening before the shooting. Johnson testified that he and Burnette were then continuously together that evening. Johnson did not testify as to the first purported conversation between him, Scott, and Burnette. Johnson testified that he

[4] Jackson's brother testified that he was upset with Jackson for testifying against Johnson because Jackson had told his brother that Johnson hit a lick playing dice.

later drove around with Mike and Burnette and that Johnson and Burnette were ultimately dropped off at the gas station at around 1:00 or 1:15 a.m., where Johnson saw several police cars gathered. From there, Burnette and Johnson returned to Scott's home, and Johnson told Scott that he had seen the police at the gas station. Johnson's girlfriend then picked him up around 2:30 a.m. Johnson confirmed that the next day he went over to Jackson's house, but Johnson denied speaking to Jackson about hitting a lick.

Judge Edwards found Johnson guilty of first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, and carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm), MCL 750.227b. Johnson was sentenced to life imprisonment without parole for the first-degree murder conviction, 20 to 30 years' imprisonment for assault with intent to rob while armed, and a consecutive two-year sentence for the felony-firearm conviction.

B. SCOTT'S JURY TRIAL

At Scott's trial, Burnette's testimony was more internally consistent but differed in large portions from his testimony at Johnson's bench trial. Burnette again testified that on the night of the shooting, he was with both defendants at Scott's house when defendants mentioned that they were going to hit a lick. Burnette then testified that his father picked him up at 10:30 p.m. and that they were together until around 2:00 a.m., at which point Burnette went back to Scott's house and met up with both defendants. Notably missing from Burnette's testimony was any indication that he had spent time that night driving around with Johnson and Mike.

Burnette also did not mention having seen any ambulances or police cars in the neighborhood.

As before, Burnette testified that, at Scott's house, all three of the men were drinking and smoking marijuana and that he had personally consumed 32 bottles of Budweiser and a half pint of Hennessy, in addition to smoking 10 marijuana cigars. Burnette testified that Scott told him that "they had shot a lady" because she would not give them any money, while Johnson told him that only Scott "had shot the lady." This time, Burnette claimed he distinctly remembered that this was the first time he learned a lady had been shot, not when he saw the police at the gas station. Burnette testified that both defendants told him that the shooting happened at the gas station. Burnette also testified that Scott was the one who told him that the woman's name was "Lisa" and that Johnson told him that Johnson and Scott had an "AK and a rifle." According to Burnette, his conversation with Johnson and Scott lasted until 3:00 a.m. or 4:30 a.m., at which point Johnson left when his girlfriend arrived to pick him up.

Consistent with his prior testimony, Burnette claimed that he went to sleep in Scott's car, where he was later awakened by the police. Burnette then gave conflicting testimony regarding whether the police threatened to charge him in connection with Lisa's murder. He first claimed that the police did not threaten him but then admitted that he had previously testified that the police indicated they were going to charge him if he did not state that defendants had killed Lisa. Burnette also testified that people in the neighborhood had threatened him for speaking to the police and testifying.[5]

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[5] This information had not been presented at Johnson's trial.

Jackson testified consistently with his testimony at Johnson's trial that he heard a gunshot, went outside to see a police vehicle, saw Scott, and was questioned by the police that evening along with Scott. Jackson further explained that when the police questioned him and Scott after the shooting, Scott told the police that he saw two men walking through his girlfriend's yard and that both men had rifles. Jackson said the police then took him and Scott downtown for further questioning at around 1:15 a.m. Jackson then returned to his grandmother's home, and he was unaware if Scott was also released from custody. Johnson visited the following morning. Jackson testified that he had started drinking before Johnson came over, but Jackson did not mention how much he drank and did not mention that he had ingested any other substances, like prescription medicine or marijuana. Jackson's testimony as to what Johnson said was consistent with his testimony at Johnson's trial. Jackson stated that he went to the police station the following day because the police had told him that he was "hiding something."

Scott did not testify or call any witnesses. A .22 caliber rifle was found at Scott's girlfriend's home, but the parties stipulated that the rifle was inoperable. A jury convicted Scott of the same offenses for which Johnson had been convicted, and Judge Edwards imposed the same sentences.

C. DIRECT APPEALS AND MOTIONS FOR RELIEF FROM JUDGMENT

Both defendants appealed by right. The Court of Appeals affirmed Johnson's convictions. *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued March 26, 2002 (Docket No. 228547). The same Court of Appeals panel vacated on double-jeopardy grounds Scott's conviction of assault with

intent to rob while armed but otherwise affirmed his convictions and sentences. *People v Scott*, unpublished per curiam opinion of the Court of Appeals, issued March 26, 2002 (Docket No. 228548). This Court denied both defendants' applications for leave to appeal. *People v Johnson*, 467 Mich 911 (2002); *People v Scott*, 467 Mich 911 (2002).

Johnson thereafter filed three motions for relief from judgment. In his second motion for relief from judgment, Johnson presented, as a claim of newly discovered evidence, Burnette's recantation and an affidavit from Jackson's relative that Jackson lied at the trials. The trial court denied the motion, and the Court of Appeals and this Court denied leave to appeal. *People v Johnson*, unpublished order of the Court of Appeals, entered February 11, 2009 (Docket No. 287529); *People v Johnson*, 485 Mich 893 (2009). Johnson's third motion for relief from judgment presented additional newly discovered evidence, which included police reports regarding domestic violence disputes between William and Lisa. Again, the trial court denied the motion, and the Court of Appeals and this Court denied leave to appeal. *People v Johnson*, unpublished order of the Court of Appeals, entered December 2, 2010 (Docket No. 298189); *People v Johnson*, 489 Mich 990 (2011).

Johnson filed his current and fourth motion for relief from judgment in December 2011. In particular, Johnson claimed that there was newly discovered evidence that one of the victim's children, Skinner, could attest that neither defendant was the shooter. The trial court denied the motion without a hearing, and the Court of Appeals denied relief. *People v Johnson*, unpublished order of the Court of Appeals, entered May 30, 2013 (Docket No. 311625).

Scott filed his first and only motion for relief from judgment in March 2013. Scott raised the same newly discovered evidence claim concerning Skinner, along with the claims of newly discovered evidence that Johnson had made in his previous motions for relief from judgment. The trial court[6] denied the motion without a hearing, and the Court of Appeals denied leave to appeal. *People v Scott*, unpublished order of the Court of Appeals, entered November 5, 2013 (Docket No. 317915).

Both defendants filed applications for leave to appeal in this Court. This Court remanded the cases to the Court of Appeals for consideration as on leave granted, directing the Court of Appeals to first remand these cases to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), to determine whether defendants were deprived of their right to the effective assistance of counsel and whether defendants were entitled to new trials based on newly discovered evidence. *People v Johnson*, 497 Mich 897 (2014); *People v Scott*, 497 Mich 897 (2014).

D. EVIDENTIARY HEARING

After consolidating the cases, the Court of Appeals remanded the case to the trial court for an evidentiary hearing. At the evidentiary hearing, Skinner testified that he was eight years old at the time his mother was killed. Skinner testified that on the evening in question, he and his family went to a drive-in movie theater, specifically recalling that they saw the movie "Life." When they stopped at Miller's house after the

[6] Judge Edwards has since retired, and his successor, Judge James Callahan, presided over Scott's proceeding for motion for relief from judgment and the evidentiary hearing that followed.

movie, Skinner testified that William went in by himself, while everyone else waited in the car. Skinner was originally sitting in the back seat of the van, but he had moved up to the front passenger seat as they waited for William to return. Skinner remembered that Lisa appeared agitated and that she left the van at one point to briefly speak with William. When she returned to the van and opened the door to get back in, Skinner saw a man behind her. Skinner recalled that the man was African-American and in his mid-thirties, with very short hair, a beard, and a big nose.[7] Skinner testified that the man's face was visible, even though it was dark out, because the dome light of the van had turned on when Lisa opened the door. Skinner stated that the man was standing behind Lisa and off to the side, and he was able to see the man for "[a]bout 25 seconds." When the man was about 6 inches behind her, with the door between him and Lisa, Skinner heard a gunshot, and the driver's-side window shattered. Lisa got into the car and raced to the nearest gas station, where she later collapsed.

After his mother's death, Skinner never talked to William or the rest of his family about what he saw that night. He was not interviewed by any police officers, but he testified that if an officer had asked him about what he witnessed that night, he would have told the truth and would have been able to identify the shooter. Some time after the shooting, Skinner moved to Pennsylvania to live with his biological father's family. His family attempted to speak to him about his mother's death, but Skinner refused. He recalled see-

[7] Both defendants were in their twenties at the time of the shooting. The trial court also noted that Skinner's description of the shooter was "completely contrary to the physical characteristics of both defendants in this case."

ing a counselor to talk about his mother, but he did not tell the counselor about what he saw that night.

In 2007, the Wisconsin Innocence Project contacted Skinner by telephone, and Skinner indicated that he saw what had happened to his mother. Skinner did not give the Wisconsin Innocence Project a description of the shooter, and the Wisconsin Innocence Project never followed up with Skinner. In 2011, Skinner was contacted by an investigative reporter, who wrote a letter inquiring about his mother's death. Skinner testified that when he received the letter, he was surprised to learn that they were still trying to find out who had killed his mother. Based on this letter and the news articles he read, Skinner got the impression that defendants were wrongly convicted, so he spoke to the reporter, revealing for the first time his account of the shooting and giving the reporter a description of the shooter, noting that he "will never forget the person's face." The Michigan Innocence Clinic subsequently showed Skinner a photo lineup that included pictures of both defendants from the time of the incident, and he was confident that the person who shot his mother was not in the lineup.

At the evidentiary hearing, Skinner acknowledged that he had been previously convicted of perjury for falsely testifying in a case in which his friend was charged in connection with a double homicide. But Skinner testified that he would not lie to protect someone he did not know and that he would tell the truth in order to find his mother's killer.

Dr. Katherine Rosenblum, who was qualified as an expert in clinical and developmental psychology, also testified at the evidentiary hearing. Rosenblum testified that an eight-year-old child who witnessed a traumatic event would certainly be mature enough to have clear

memories of the event. Rosenblum noted that research suggests a "narrowing of attention" in moments of high traumatic stress that leads people to "focus on and remember very clearly particular details . . . to the exclusion of some other, more peripheral details."

Burnette also testified at the evidentiary hearing, recanting much of what he had testified to at defendants' trials. Burnette asserted that neither defendant confessed to robbing or shooting a woman. Burnette also testified that he did not see either defendant with a gun on the day in question and that he was with Johnson at a relative's home at the time of the shooting. Burnette took back his previous testimony that the police had not threatened him, indicating that he had been afraid that he would be charged with the murder if he did not implicate someone. Burnette also stated that he was not coerced by either defendant or their families into giving his recantation testimony. On cross-examination, the prosecutor cited Burnette's preliminary examination testimony, in which he had testified that he was afraid of defendants, but Burnette denied this, saying he was coached by the police to say he was scared.

Though Jackson had died in 2008, his cousin, Lameda Thomas, testified at the evidentiary hearing that Jackson had told her that he had lied on the stand out of fear of prosecution on two separate occasions. Specifically, Thomas testified that Jackson had stated he lied about Johnson telling him he hit a lick and had to shoot.

E. TRIAL COURT'S RULING

The trial court denied both defendants' motions for relief from judgment, concluding that there was no reasonable probability of a different result if Skinner testified on retrial.

Specifically, the trial court found Skinner's testimony to be incredible for several reasons. First, the trial court concluded that Skinner could not have witnessed the shooting because Skinner would have been asleep based on the fact that he was on the way back from seeing the movie "Life," which was not "Fantasia here or a Mickey Mouse cartoon. . . . So we're talking about [a movie about] life imprisonment or whatever . . . [s]omething that a child would have nothing to relate to." Accordingly, the trial court concluded that the children, including Skinner, "undoubtedly . . . were asleep in the back of the van . . . ."

Second, even if Skinner had not been asleep, the trial court found that Skinner "wouldn't have been capable of seeing anybody outside," much less be able to pick out details regarding facial hair. The trial court reasoned that Lisa would have blocked Skinner's vision, as she stood between him and the shooter, and that the dome light would not have shed any light outside the car.

Third, the trial court questioned Skinner's overall credibility based on his perjury conviction, stating: "Should we believe him, seeing as how he was in prison for perjury? I mean good grief. Doesn't that go right to the essence of it?"

Lastly, the trial court noted that a significant amount of time had passed since the shooting had occurred. The trial court found it relevant that Skinner could not remember the name of his teacher or the school that he attended at the time. The trial court also found it hard to believe that Skinner would be able to remember what the shooter looked like:

> I bet [Skinner] couldn't remember what his mother looked like today. . . . I have difficulty remembering what my father looked like, and it wasn't that long ago or my wife

> for that matter, which wasn't that long ago. But yet, he remembers what this shooter looked like at the time? I find it almost impossible to believe.

With regard to Burnette and Jackson, the trial court stated that "[e]very one of the testimonies that were given during the course of the preliminary examination and the trial[s], and we're talking about four different occasions here, was the same by Mr. Burnett [sic] and by Mr. Jackson."[8] The trial court also noted that both witnesses knew the type of weapon that was used for the killing and both witnesses identified the victim by name. As to Burnette's testimony that he was coached by the police, the trial court found this illogical, reasoning that the police would not be able to predict what would be asked of Burnette. The trial court finally concluded that it could not find "any reasonable probability that there would be a different result in this case, even if Mr. Skinner was allowed to give testimony in regard to this matter, nothing."[9]

F. COURT OF APPEALS' RULING

The Court of Appeals majority affirmed the trial court's ruling in an unpublished per curiam opinion. *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued May 31, 2016 (Docket No. 311625). Although the Court of Appeals disagreed with the trial court's factual finding that Skinner had to have been asleep at the time of the shooting, the Court

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[8] The preliminary examination was jointly held for both defendants. Thus, the trial court was incorrect to note that there were four occasions when the witnesses previously testified, as there were only three occasions: the joint preliminary examination, and then the separate trials.

[9] The trial court also concluded that the domestic violence records would not make a different result probable on retrial.

of Appeals nevertheless found that the trial court did not clearly err by finding Skinner's testimony unreliable. Furthermore, the Court of Appeals held that the recantations were not part of this Court's remand order and that the trial court had thus erred by considering these other claims. Even if the recantations could be considered, the Court of Appeals held that the trial court correctly determined that the recantations "seriously lacked any substantive weight." *Id*. at 10 n 8.[10]

Defendants each filed an application for leave to appeal in this Court. We granted leave in both, ordering that the cases be argued together. *People v Johnson*, 501 Mich 914 (2017); *People v Scott*, 501 Mich 914 (2017).

II. STANDARD OF REVIEW

This Court reviews a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citation omitted). A mere difference in judicial opinion does not establish an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999).

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[10] The Court of Appeals also held that the trial court erred by considering the domestic violence records because it was outside the scope of this Court's remand order and, in any event, the records would be inadmissible hearsay. Because we conclude that Skinner's testimony, in conjunction with the evidence presented at the original trials, is sufficient to find a different result probable on retrial, it is unnecessary for us to consider whether the domestic violence records would be admissible and what their potential impact would be on retrial.

A trial court's factual findings are reviewed for clear error. MCR 2.613(C). Clear error occurs if "the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014) (quotation marks and citations omitted). MCR 2.613(C) provides that "regard shall be given to the special opportunity of the trial court to judge the credibility of the *witnesses who appeared before it*." (Emphasis added.) And "appellate courts need not refrain from scrutinizing a trial court's factual findings, nor may appellate courts tacitly endorse obvious errors under the guise of deference." *People v McSwain*, 259 Mich App 654, 683; 676 NW2d 236 (2003) (quotation marks and citation omitted).

III. ANALYSIS

Motions for relief from judgment are governed by MCR 6.500 *et seq*. MCR 6.508(D)(3) provides that a court may not grant relief to a defendant if the motion alleges grounds for relief that could have been previously raised, unless the defendant demonstrates both good cause for failing to raise such grounds earlier as well as actual prejudice. The newly discovered evidence claim pertaining to Skinner's eyewitness account could not have been raised on appeal from defendants' convictions or in a prior motion for relief from judgment because defendants did not know that Skinner saw the shooting until 2011. Therefore, MCR 6.508(D)(3) does not bar the newly discovered evidence claims regarding Skinner's account.

Although Scott's motion was his first motion for relief from judgment, Johnson's motion was a successive motion for relief from judgment, which is also governed by MCR 6.502(G). Generally speaking, "one and only one motion for relief from judgment may be filed with regard to a conviction. . . . A defendant may

not appeal the denial or rejection of a successive motion." MCR 6.502(G)(1). However, a defendant may file a successive motion based on "a claim of new evidence that was not discovered before the first such motion." MCR 6.502(G)(2). The prosecutor does not argue that defendants' claim of newly discovered evidence in the form of Skinner's testimony is procedurally barred, either under MCR 6.502(G) or MCR 6.508(D)(3)(a).

In their current motions for relief from judgment, defendants raise the claim of newly discovered evidence in the form of Skinner's testimony.[11] In order for a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Cress*, 468 Mich at 692 (quotation marks and citation omitted). The Court of Appeals analyzed the first three *Cress* factors and concluded that defendants satisfied their burden under each factor. On appeal, the prosecutor does not contest the Court of Appeals' conclusions as to the first three factors of *Cress*. Thus, the central issue before this Court is the fourth prong of *Cress*, whether "the new evidence makes a different result probable on retrial." *Id*.

A. CREDIBILITY

In order to determine whether newly discovered evidence makes a different result probable on retrial, a

[11] Because this is Scott's first motion for relief from judgment, his claim of newly discovered evidence also includes the witness recantations and the domestic violence records.

trial court must first determine whether the evidence is credible. *Id*. at 692-693. In making this assessment, the trial court should consider all relevant factors tending to either bolster or diminish the veracity of the witness's testimony. See *id*. at 692-694. A trial court's function is limited when reviewing newly discovered evidence, as it is not the ultimate fact-finder; should a trial court grant a motion for relief from judgment, the case would be remanded for *retrial*, not dismissal. In other words, a trial court's credibility determination is concerned with whether a *reasonable juror* could find the testimony credible on retrial. See *Connelly v United States*, 271 F2d 333, 335 (CA 8, 1959) ("The trial court has the right to determine the credibility of newly discovered evidence for which a new trial is asked, and if the court is satisfied that, on a new trial, *such testimony would not be worthy of belief by the jury*, the motion should be denied.") (quotation marks and citation omitted; emphasis added).

Recently, in *People v Anderson*, 501 Mich 175; 912 NW2d 503 (2018), we compared the respective roles of a trial judge presiding over a motion for a new trial and a magistrate presiding over a preliminary examination when rendering credibility determinations. We held that, in the context of a preliminary examination, "[i]f a witness's lack of credibility, when considered together with the other evidence presented during the examination, is so lacking that 'a person of ordinary prudence and caution [would not] conscientiously entertain a reasonable belief of the accused's guilt,' a magistrate may not bind over the defendant for trial." *Id*. at 188-189 (citation omitted). See also *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) ("As the trier of fact, the jury is the final judge of credibility.") (quotation marks and citation omitted); *Yaner v People*, 34 Mich 286, 289 (1876) ("We do not

desire to be understood that the magistrate must nicely weigh evidence as a petit jury would, or that he must discharge the accused where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt; *all such questions should be left for the jury upon the trial*.") (emphasis added). Although *Anderson* does not control in this context, as we are not now dealing with a preliminary examination, a trial court similarly plays a preliminary gatekeeping role in assessing a defendant's motion for relief from judgment; in both situations, the trial court is contemplating a future trial and the role of a future fact-finder.[12] If a witness's lack of credibility is such that *no* reasonable juror would consciously entertain a reasonable belief in the witness's veracity, then the trial court should deny a defendant's motion for relief from judgment. However, if a witness is not patently incredible, a trial court's credibility determination must bear in mind what a reasonable juror might make of the testimony, and not what the trial court itself might decide, were it the ultimate fact-finder.

In this case, the trial court found that Skinner was not a credible witness. Importantly, the trial court noted that Skinner could not have witnessed the shooting, because the trial court found that Skinner must have been asleep. If Skinner was asleep for the shooting, then there could be no value to Skinner's testimony. As this was a factual determination, we review it for clear error, which exists if "the reviewing court is left with a definite and firm conviction that the trial court made a mistake." See *Douglas*, 496 Mich at 592

[12] This Court noted in *Anderson* that there is some justification for "providing a magistrate with greater authority to examine credibility during a preliminary examination than a judge has in entertaining a motion for a new trial." *Anderson*, 501 Mich at 187 n 4.

(quotation marks and citation omitted). We, like the Court of Appeals, conclude that the trial court clearly erred by finding that Skinner was asleep during the shooting. Nothing in the record suggested that Skinner had been asleep beyond the trial court's mere speculation that the movie "Life" would certainly put a child to sleep. Even if the trial court were right to assume that Skinner was asleep during the movie, there is nothing to suggest that Skinner could not have woken up afterwards. In fact, Skinner specifically testified that, once William went into the house, he climbed into the front passenger's seat with his mother, indicating that he was awake and did witness the events. Because the trial court's factual finding was not rooted in anything in the record, the trial court clearly erred by finding that Skinner was asleep during the shooting.[13]

The trial court also found that Skinner's testimony was not credible even if he had been awake. The trial court particularly questioned Skinner's ability to remember the shooter's face, noting that Skinner could not possibly remember what his own mother looked like, given that the trial judge had difficulty remembering his own father's face or his wife's face, despite them passing more recently than Lisa. To the extent the trial judge supported his credibility determination on the strength of his own memory, the trial court clearly erred. Because the focus is on whether a *reasonable juror* could credit Skinner's testimony, the trial judge's focus on his own personal gaps in memory was inappropriate. Whether or not a judge has a particularly good or bad memory has no legal relevance to whether a reasonable juror would find that a witness

[13] The prosecutor conceded that the trial court's finding that Skinner was actually asleep at the time of the murder was clearly erroneous because it was speculative and unsupported by the record.

has the ability to recall something, especially when an expert witness has testified in support of that ability. In fact, the trial court failed to acknowledge Rosenblum's expert testimony, which indicated that it would not be impossible for a child of Skinner's age to recall specific details from a traumatic event several years later.

The trial court additionally found that Skinner was not credible because Skinner could not have seen the shooter due to the position of Lisa's body. The trial court also considered the effect of Skinner's prior perjury conviction on his credibility. See MRE 609. Although it is appropriate for a trial court to take into account such weaknesses in a witness's testimony, the trial court failed to determine whether a reasonable juror might conclude that Skinner is nonetheless credible with regard to the facts at issue here. The trial court failed to consider whether a reasonable juror could have believed that, depending on the angle of approach, the darkness of the street, and the lighting conditions in the car, Skinner might have been able to make out defining characteristics of the shooter's face. A reasonable juror also could have credited the fact that Skinner lacked any motive to lie in this case. Although Skinner had a prior conviction for perjury, that conviction was obtained under circumstances very different from the case at hand.

Indeed, Skinner's testimony corroborated several specific details that took place on the night of the shooting, such as the specific film his family had watched that night, that Lisa had been driving the van, that William had visited a relative's home while Lisa and the others waited in the van, that Lisa momentarily left the car to speak with William, and that the gunshot broke the driver's window. While

Skinner's testimony contained some questionable aspects, which the trial court appropriately noted, it also contained some reliable aspects, which the trial court failed to acknowledge. When considering Skinner's testimony in its entirety, it is clear that his testimony is not wholly incredible, as the trial court found, and that a reasonable juror could find his testimony worthy of belief on retrial. Therefore, the trial court clearly erred when it concluded that Skinner's testimony was entirely incredible.

B. RESULT ON RETRIAL

Because a reasonable juror could have found Skinner's testimony to be credible, we now consider the impact of that testimony in conjunction with the evidence that would be presented on retrial. In examining whether this "new evidence makes a different result probable on retrial," the trial court must consider the evidence that was previously introduced at trial. *Cress*, 468 Mich at 692; see also *People v Grissom*, 492 Mich 296, 321; 821 NW2d 50 (2012) (ordering "the trial court [on remand to] carefully consider the newly discovered evidence *in light of the evidence presented at trial*") (emphasis added). The trial court must also consider the evidence that would be admitted at *retrial*, which in this case includes the recantation testimony. *Cress* specifically uses the term "retrial," which refers to a *new* trial. Thus, the evidence that must be taken into consideration when assessing a claim of newly discovered evidence is not simply the evidence presented at the original trial, but also the evidence that would be presented at a new trial. *Cress*, 468 Mich at 694 ("[The confessor's] testimony (even presuming he would testify at a *new trial*) would not make a different result probable on

retrial.") (emphasis added). Accordingly, the Court of Appeals erred by failing to examine the evidence presented at the original trials and holding that the recantations were beyond the scope of this Court's remand order.

In this case, we find that the trial court failed to properly assess the effect of the newly discovered evidence in conjunction with the evidence that was presented at the original trials. Notably, Skinner testified that neither defendant was the shooter. Skinner described the shooter as being in his mid-thirties, and neither defendant was in his thirties at the time of the shooting. Additionally, Skinner stated that the shooter had a large nose and a beard, which the trial court noted was "completely contrary to the physical characteristics of both defendants in this case." Although the trial court had reason to question some aspects of Skinner's testimony, Skinner's testimony is only strengthened when considered in conjunction with the evidence presented at the previous trials.

Burnette was the prosecutor's key witness, as he was the only witness who testified that defendants admitted to shooting Lisa, and he was the only witness who testified that he saw defendants with weapons. In considering the value of Burnette's trial testimony, the trial court found "[e]very one of the testimonies that were given during the course of the preliminary examination and the trial[s], and we're talking about four different occasions here, was the same by Mr. Burnett [sic] . . . ." However, the trial court judge who presided over these motions for relief from judgment was not the same judge who presided over the preliminary examination or the original trials. The trial court judge thus was functionally in the same position as an appellate court where the

credibility of witnesses at the preliminary examination and the original trials was concerned. Accordingly, the trial court's determination that Burnette's trial testimony was credible need not be afforded any deference by this Court. See MCR 2.613(C) ("[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the *witnesses who appeared before it*.") (emphasis added).

The trial court's finding that Burnette's previous testimony was consistent and compelling is also not supported by the record. To begin with, the prosecutor had to repeatedly refresh Burnette's memory at Johnson's trial with his prior police statement and his testimony at the preliminary examination when Burnette did not initially testify in favor of the prosecutor's position.[14] Burnette was also unable to give a coherent time line as to what happened on the night in question; in reviewing the record, it remains unclear when and if Burnette and Johnson went on a ride with Mike, as multiple different possibilities were suggested at Johnson's trial, yet no mention of this was made at Scott's

[14] For example, when Burnette was asked whether Johnson talked about hitting a lick, Burnette said, "No." And when asked, "Did you tell the court that [Johnson] talked about hitting a lick?", Burnette responded, "I can't recall." The prosecutor then pointed out that Burnette had previously testified at the preliminary examination that Johnson spoke about hitting a lick, and Burnette agreed that this was true. In addition, when asked if Johnson had told Burnette anything, Burnette said, "Not that I can recall." Then, when Burnette was asked, "Did you ever tell the police what [Johnson] said to you at [Scott's] house?", Burnette again said, "I can't recall." Burnette was then asked to refresh his memory with his police statement, and after this, Burnette admitted that he told the police that Johnson said that Scott shot the lady. Furthermore, when asked if he saw either of the defendants with a gun that night, Burnette said, "Not if I can remember." Burnette once again had to have his memory refreshed with his preliminary examination testimony, and once he did, he remembered that he saw defendants with guns.

trial.[15] Burnette's discussion of his ride with Mike alone is confusing and internally inconsistent, as Burnette alternatively testified that Mike dropped both him and Johnson off at the gas station, that Mike dropped him and Johnson off somewhere else entirely, and that Burnette never returned to the gas station.

There were also significant inconsistencies between the testimonies Burnette gave at the two different trials. At Johnson's trial, Burnette initially testified that he first learned that there had been a shooting due to the police presence in the neighborhood, but he later suggested that the defendants were the ones who first told him about the shooting. Burnette also did not clarify whether he learned the victim's name from the police or the defendants. Furthermore, Burnette could not recall if only one defendant or both had mentioned "hitting a lick," whether Johnson had confessed that Scott had shot Lisa, and whether he had seen any weapons. At Scott's trial, Burnette instead testified that defendants were the ones who first told him about the shooting, that defendants were the ones who told him the victim's name, and that he saw defendants with guns. Clearly, Burnette's testimonies across both trials were *not* the same, contrary to the trial court's finding, and there is no larger consistent narrative to rely on in trying to uphold Burnette's prior trial testimonies as credible.

Moreover, the trial court failed to note that Burnette's and Jackson's testimonies also conflicted with one another; in order to find one credible, the other

[15] Although this information would arguably be more relevant at Johnson's trial than at Scott's trial, Burnette did testify at Johnson's trial that he was dropped off at the same gas station that Lisa drove to, where he saw an ambulance and police officers and first learned of this shooting. Were this true, this would clearly be relevant at Scott's trial, but it goes unmentioned.

would have to be found not credible. Burnette testified that defendants told him around 2:30 a.m. that they shot someone and that he later saw Scott place his gun in a vehicle at 7:00 or 8:00 a.m. However, Jackson testified that he and Scott were taken into custody shortly after the shooting at approximately 1:15 a.m., and an officer confirmed that Scott remained at the police station until at least 8:00 or 8:30 a.m. Additionally, Jackson claimed that he and Scott were in police custody at a time when Burnette claimed he spoke with Scott outside of custody. It is thus impossible to fully credit both accounts, as they are incompatible and cannot be reconciled. This is particularly significant because these early morning hours are when Burnette testified that defendants admitted to shooting someone.

While Jackson's testimony is not as questionable as Burnette's testimony, Jackson's testimony alone provides scant evidence that defendants committed the crime. Jackson testified that he witnessed Scott hand over an object to Scott's girlfriend after the shooting and that Johnson told him that he had hit a lick and had to shoot. However, he also testified that he believed the object to be a dog leash and that "hitting a lick" could refer to something that happens in a game of dice.

Burnette's and Jackson's testimonies were also inconsistent as to whether the police threatened them. At Scott's trial, Burnette testified that the police did not tell him that they believed he was involved in the shooting, but Burnette later agreed that the police told him he would be implicated in the murder if he did not state who did it. At Johnson's trial, Jackson initially testified that the police did not threaten him but later claimed that the police scared him. Jackson stated that

he also felt pressured to confess or else he would have been implicated in the crime.

More inconsistencies abound: although the trial court stated that both witnesses identified that a .22 caliber rifle was used, the record shows that only Burnette testified to this, as Jackson never identified the object Scott handled as a gun. Moreover, while Burnette testified that Johnson told him that *Scott* had shot someone, Jackson testified that *Johnson* was the one who admitted being the shooter.

Finally, the trial court also failed to take into account that both witnesses admitted to consuming copious amounts of alcohol and marijuana during the times that defendants purportedly made incriminating statements, which severely undermines the reliability of their assertions. Jackson even admitted to hearing and seeing things that did not exist, which further weighs against his credibility.

An examination of the trial testimony alone indicates that defendants' convictions were based on shaky grounds.[16] Consequently, when Skinner's testimony is considered in conjunction with the other evidence

[16] "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States v Agurs*, 427 US 97, 113; 96 S Ct 2392; 49 L Ed 2d 342 (1976). Similarly, in an ineffective assistance of counsel claim, when there is little evidence to support a conviction, then "the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt." *People v Trakhtenberg*, 493 Mich 38, 56; 826 NW2d 136 (2012) (quotation marks and citation omitted). While *Agurs* involved whether the defendant was deprived of a fair trial under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and *Trakhtenberg* involved whether the defendant was deprived of his right to the effective assistance of counsel under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), both are instructive because *Brady* and *Strickland* require an assessment as to whether the new evidence or ineffective assistance

presented at the original trials, we find that a different result is reasonably probable on retrial. See *People v Tyner*, 497 Mich 1001, 1001-1002 (2015).

While consideration of Skinner's testimony alone would make a different result probable on retrial due to the weaknesses of the prosecutor's witnesses, this Court may also consider the evidence that would be presented at *retrial*, which in this case includes the recantation testimony.[17] On retrial, we assume that Burnette would be called to testify consistently with his recantation that he was with Johnson the night that Lisa was shot and that neither defendant said anything in regards to the shooting. Additionally, if the prosecutor chose to admit Jackson's testimony from the original trials implicating defendants on retrial, defendants would be able to impeach that testimony with his cousin's testimony that he committed perjury. MRE 804(b)(3); MRE 806.[18]

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calls into question the validity of a prior conviction. *Brady*, 373 US at 87; *Strickland v Washington*, 466 US at 694.

[17] While Johnson already raised the recantation evidence in a prior motion for relief from judgment, the recantations may nonetheless be taken into consideration, as conceded by the prosecutor. Though Johnson is barred from raising the recantations as an *independent* ground for relief, the court rules do not prohibit considering this evidence *in the context of* the claim Johnson is now raising. This is not in contravention of MCR 6.508(D)(2), as the particular ground for relief that Johnson now raises, which concerns Skinner's testimony, has never been decided against Johnson in a prior proceeding. This is further supported by *Cress*, which requires a determination of whether "the new evidence makes a different result probable on *retrial*." *Cress*, 468 Mich at 692 (emphasis added).

[18] The prosecutor argues that Jackson's recantation would be inadmissible pursuant to MRE 804(b)(3): "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." However, the recantation would be admissible because defendant has the right, per MRE 806, to attack the credibility of Jackson's former testimony. MRE 806 ("When a hearsay

In considering the weight of these recantations, the trial court was correct to approach the recantations with suspicion. See *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977) ("Where such [newly discovered] evidence, however, takes the form of witnesses' recantation testimony, it has been traditionally regarded as suspect and untrustworthy."); *People v Van Den Dreissche*, 233 Mich 38, 46; 206 NW 339 (1925) ("[R]ecanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true.") (quotation marks and citation omitted). However, given the inherent weakness of Burnette's prior testimony at the trials, his recantation should not be viewed with as much suspicion as generally accorded. In fact, unlike *Van Den Dreissche*, in which there was no evidence to support the witness's recantation, here, Burnette's recantation *was* supported by the record. See *Van Den Dreissche*, 233 Mich at 41.

Again, Burnette's previous testimony was incoherent at several points, and, notably, Burnette likely did not speak to or see Scott after the shooting because Scott was already in police custody at that point. This provides support that Burnette's previous testimony was not credible and that his recantation is *more* credible. See *Barbara*, 400 Mich at 363-364; *Grissom*, 492 Mich at 350 (ZAHRA, J., concurring in part and dissenting in part) ("[N]ewly discovered evidence to

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statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness."); see also *Blackston v Rapelje*, 780 F3d 340, 352-353 (CA 6, 2015) (holding that a refusal to allow a defendant to impeach unavailable witnesses' prior testimony with the witnesses' later recantations violated the Sixth Amendment right to confrontation of witnesses).

impeach a witness could potentially make a different result probable on retrial if it directly contradicts material testimony by that witness at trial in a manner that tends to exculpate the defendant."). Without Burnette's testimony, there is scant other evidence to establish that defendants committed the crime. Thus, Burnette's recantation further supports our conclusion that a different result is probable on retrial.

While Jackson's trial testimony was not inherently as weak as Burnette's trial testimony, it was also not as material as Burnette's trial testimony. Even if Jackson's recantation is not presented, considering Jackson's previous testimony in light of the other evidence that would be presented at retrial, we believe that defendants have a reasonably likely chance of acquittal.

Therefore, we conclude that Skinner's testimony would make a different result probable on retrial.

IV. CONCLUSION

For the aforementioned reasons, we hold that the newly discovered evidence of Skinner's testimony entitles both defendants to new trials. In balancing the evidence presented at the trials along with Skinner's testimony, the only principled outcome that can be reached is that Skinner's testimony would make a different result probable on retrial. This is further supported when considering the impact of the recantations on Burnette's trial testimony. For these reasons, we reverse the Court of Appeals' judgment in part and remand this case to the trial court for new trials.

MARKMAN, C.J., and VIVIANO and CLEMENT, JJ., concurred with BERNSTEIN, J.

ZAHRA, J. (*dissenting*). I dissent. The majority grants each defendant a new trial on the basis of new evidence that is, in my view, implausible. The majority fails to provide a reasonable and proper basis to reject the trial court's credibility determination in regard to defendants' newly discovered witness, Charmous Skinner Jr. In finding that Skinner's testimony lacked credibility, the trial court identified three pertinent facts: (1) Skinner was only 8 years old at the time of the murder and his previously undisclosed memory, offered some 16 years later, could not be certain, (2) Skinner's view of the shooting likely would have been obstructed and limited by the existing conditions as well as Skinner's proximity in the car in which he was seated at the time of the shooting, and (3) Skinner's prior perjury conviction.[1] These three findings are more than enough to conclude that the trial court did not clearly err by determining that Skinner's testimony was not credible.

Further, I disagree with the majority that the trial court failed to properly assess the effect of the newly discovered evidence in conjunction with the evidence that was presented at the original trials. Judge Prentis Edwards presided over both of defendants' trials and presided over Johnson's three previous motions for relief from judgment. After the retirement of Judge Edwards, the instant postjudgment matters in defendants' cases were transferred to Judge James Callahan. Contrary to the conclusions reached by the majority, Judge Callahan did not position himself "as an appellate court where the credibility of witnesses at the preliminary examination and the original trials

[1] The trial court also concluded that Skinner was, in all likelihood, asleep at the time of the shooting. The prosecutor conceded in the Court of Appeals that this reason was speculative and unsupported by the record, and thus clearly erroneous. Accordingly, this reason has not been disputed before this Court.

was concerned." Rather, Judge Callahan only highlighted that the evidence relied upon by Judge Edwards at defendant Johnson's bench trial was consistent with the district court's findings at the preliminary examination and the evidence supporting the jury's verdict in defendant Scott's trial. Yet, the majority ignores these previous findings and fails to give regard to the special opportunity Judge Edwards and the district judge had to assess and weigh the credibility of the witnesses who appeared before them. The fact is Judge Callahan merely acknowledged that the district judge and Judge Edwards both opined that witnesses Antonio Burnette and Raymond Jackson were credible. And their findings were confirmed by Scott's jury, which rendered a verdict of guilty after a mere 1½ hours of deliberation.

Instead, the majority relies on alleged "inconsistencies" during the Johnson bench trial to override the findings of Judge Edwards that supported Johnson's murder conviction. Significantly, Judge Edwards did not rely on a single piece of evidence upon which the majority relies to vacate defendants' convictions. Rather, Judge Edwards, a seasoned trial judge with many years' experience, considered and assessed this evidence and properly dismissed it, attributing it to reluctant witnesses who were trying, in his words, "to minimize the impact that [their testimonies] might have on [Johnson]." Judge Edwards found that these witnesses, particularly Burnette, were fearful and attempted to tailor their testimony to provide Johnson an alibi. Because of this, Judge Edwards rejected this equivocating and inconsistent aspect of the witnesses' testimony, and rightly so.

In addition, the majority compounds its error by reviewing the testimony of Burnette and Jackson in

Scott's jury trial in light of the so-called inconsistencies between the testimony presented at the preliminary examination and the testimony presented at Johnson's bench trial. The majority does not, however, identify any inconsistencies between these witnesses' testimony presented at the preliminary examination and Scott's jury trial. Thus, the majority has undermined the jury's verdict in the Scott case solely on the basis of the so-called inconsistencies presented at the Johnson trial, which, again, were explained and ultimately rejected by Judge Edwards. As explained more fully in this opinion, I would affirm the judgment and opinion of the Court of Appeals.

I. STANDARD OF REVIEW

This Court reviews a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion.[2] An abuse of discretion occurs when the trial court renders a decision that is outside the range of principled decisions.[3] "A mere difference in judicial opinion does not establish an abuse of discretion."[4] A trial court's factual findings are reviewed for clear error.[5] A factual finding is clearly erroneous when "the reviewing court, on the whole record, is left with a definite and firm conviction that a mistake has been made."[6]

" 'This Court has repeatedly held that a trial judge, in passing on a motion for a new trial, is vested with a large discretion. The wisdom of such rule is obvious.

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[2] *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

[3] *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012).

[4] *Cress*, 468 Mich at 691.

[5] MCR 2.613(C) ("[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.").

[6] *Bynum v ESAB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002).

The judge has the advantage of seeing the witnesses on the stand, of listening to their testimony, of noting the attitude of the jury to various matters that may arise during the trial, and is in far better position than is an appellate court to pass on questions of possible prejudice, sympathy, and matters generally that occur in the course of a trial but which do not appear of record.' "[7]

II. ANALYSIS

For a new trial to be granted on the basis of new evidence, a defendant must show that

> (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.[8]

The defendant carries the burden of satisfying all four prongs of this test. Throughout the litigation, the first three prongs of this test have not been disputed, and the focus of this opinion is whether defendant has established that the newly discovered evidence makes a different result probable on retrial.

Ordinarily, "motions for a new trial on the ground of newly-discovered evidence are looked upon with disfavor, and the cases where this court has held that there was an abuse of discretion in denying a motion based on such grounds are few and far between."[9] That is because "[t]he policy of the law is to require of parties

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[7] *People v Tyner*, 497 Mich 1001, 1002 (2015), quoting *Alder v Flint City Coach Lines, Inc*, 364 Mich 29, 38; 110 NW2d 606 (1961) (CARR, J., concurring).

[8] *Cress*, 468 Mich at 692 (quotation marks and citation omitted).

[9] *Rao*, 491 Mich at 279-280, quoting *Webert v Maser*, 247 Mich 245, 246; 225 NW 635 (1929) (quotation marks omitted).

care, diligence, and vigilance in securing and presenting evidence"[10] and "[t]he principle of finality is essential to the operation of our criminal justice system."[11] In fairness to both parties and the overall justice system, the law requires that parties secure evidence and prepare for trial with the full understanding that, absent very unusual circumstances, the trial will be the one and only opportunity to present their case. It is the obligation of the parties to undertake all reasonable efforts to marshal all the relevant evidence for that trial. Evidence will not ordinarily be allowed in piecemeal. *People v Cress*[12] set forth the showing that a defendant must make in order to satisfy the exception to this rule and struck a balance between upholding the finality of judgments and unsettling judgments in the very unusual case in which justice under the law requires a new trial.[13]

A. THE TRIAL COURT PROPERLY REJECTED THE NEWLY DISCOVERED EVIDENCE

I disagree with the majority that Judge Callahan clearly erred by concluding that the testimony of Charmous Skinner Jr. was not credible. Consequently, I conclude that Judge Callahan did not abuse his

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[10] *Canfield v City of Jackson*, 112 Mich 120, 123; 70 NW 444 (1897) (quotation marks and citation omitted). See also 39 Am Jur, New Trial, § 156, p 163 ("Such applications . . . are entertained with reluctance and granted with caution . . . because of the manifest injustice in allowing a party to allege that which may be the consequence of his own neglect in order to defeat an adverse verdict."); 58 Am Jur 2d, New Trial, § 297, pp 318-319.

[11] *People v Maxson*, 482 Mich 385, 398; 759 NW2d 817 (2008) (quotation marks and citation omitted).

[12] *Cress*, 468 Mich 678.

[13] See MCR 6.431(B) (providing that the trial court "may order a new trial . . . because it believes that the verdict has resulted in a miscarriage of justice").

discretion by denying defendants' motions for relief from judgment. The Court of Appeals correctly focused on four reasons upon which Judge Callahan relied to conclude that Skinner was not credible:

> (1) Skinner was only eight years old at the time of the murder and his memory some 16 years later could not be certain; (2) it would have been incredibly difficult for Skinner to be inside a car at night and see someone outside the vehicle when the only illumination was from the vehicle's interior dome light, especially when considering that both [the victim] and the car door were between [Skinner] and the shooter; (3) Skinner had already been convicted for perjury; and (4) in any event, Skinner likely would have been asleep inside the car at the time of the murder.[14]

The first three of these four reasons[15] support Judge Callahan's opinion such that his conclusion that Skinner was not credible is within the range of principled outcomes. For the first reason, the Court of Appeals correctly stated that "[c]ommon sense dictates that memories can fade and events that occurred such a long time ago would no longer be fresh in the witness's mind."[16] Defense expert Katherine Rosenblum, a clinical and developmental psychology expert, testified to the possibility of a "narrowing of attention" during moments of high traumatic stress. Rosenblum testified that an 8-year-old *could remember* the face of a perpetrator 16 years later. She testified in general terms, however, and could not testify as to Skinner's memory because she had never actually interviewed him. Rosenblum further conceded that exaggeration of facts is possible with the passage of time. Rosenblum also

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[14] *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued May 31, 2016 (Docket No. 311625), p 6.

[15] As to the remaining reason, see note 1 of this opinion.

[16] *Johnson*, unpub op at 6.

acknowledged that it was possible that an investigative reporter with whom Skinner had contact could have "planted a seed" in Skinner's mind that the wrong people were convicted. To this point, Skinner acknowledged on cross-examination that, after the reporter contacted him, he read some of the reporter's news articles about the case on the Internet and developed an impression that the police had done a poor job in investigating the case. Thus, it was only after the reporter first contacted Skinner in 2011 and after Skinner's own investigation about the incident that he gave a description of the shooter to the reporter and later to the Michigan Innocence Project.

I agree with the Court of Appeals that Judge Callahan's concern regarding the lengthy passage of time from the murder to the discovery of Skinner's testimony was well-founded. Skinner's claim that he "will never forget the person's face," and his certainty that he could "recognize that man if [he] saw him today," is, at best, an exaggeration of any memory that he did have of the event, and it is more likely that he had no memory of it at all. At minimum, I cannot conclude that Judge Callahan's decision in this regard was clearly erroneous.[17]

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[17] Another aspect that I find troubling with Skinner's testimony is his assertion that he told the Wisconsin Innocence Project (WIP) in 2007 that he could identify the shooter, and yet the WIP did not further inquire.

> [*The Prosecution*]: When the Wisconsin Innocence Project contacted you, what did they say to you?
>
> [*Skinner*]: "Did you see what happened to your mother?"
>
> [*The Prosecution*]: And what did you say to them?
>
> [*Skinner*]: "Yes."
>
> [*The Prosecution*]: You said "yes"?
>
> [*Skinner*]: Yeah.

The majority gives short shrift to the second reason that Judge Callahan found Skinner's testimony incredible and does not expressly rule whether this finding was clearly erroneous. Specifically, Judge Callahan concluded that Skinner's view from inside the van was obstructed and not illuminated. The evidentiary hearing transcript demonstrates that Judge Callahan extensively questioned Skinner regarding his viewpoint and the positioning of his mother with respect to the shooter. Skinner testified that he had climbed into the front passenger seat and that his mother was shot while she was entering the driver's side of the van. He further testified that the shooter stood behind his mother but "a little off to the side."[18] The Court of Appeals panel explained that "when Skinner heard the

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[*The Prosecution*]: And did they ask you if you could describe the person who did the shooting?

[*Skinner*]: No.

[*The Prosecution*]: They didn't ask you that?

[*Skinner*]: No.

[*The Prosecution*]: Okay, you told them that you had seen the shooting, correct?

[*Skinner*]: Yes.

[*The Prosecution*]: And they didn't ask you if you could identify the person, if you could describe them?

[*Skinner*]: No, they said they was [sic] going to fly out to Pennsylvania to come meet with me. Never heard from them again.

[*The Prosecution*]: Do you remember when that was?

[*Skinner*]: I was—'07. It was 2007.

I find this testimony dubious given the substantial amount of investigative work the WIP conducted into this matter.

[18] The record contains a rough sketch by Skinner illustrating the respective positions.

gunshot, the door window shattered, and [the victim] managed to fully get into the car, close the door, and speed away before eventually dying at the nearby gas station."[19] Judge Callahan reasonably opined that, based on this testimony, the position of Skinner's mother entering the car would have obstructed Skinner's view of the shooter. The Court of Appeals agreed, highlighting that "any view of the shooter from the passenger seat would have been obstructed. Not only was [the victim] positioned between Skinner and the shooter, but the car door was as well."[20]

Further, Skinner also testified that, despite the darkness outside the van, he saw the shooter only from the dome light in the car. The Court of Appeals noted that Judge Callahan "correctly was skeptical that an interior dome light would enable one sitting inside the vehicle to see outside the vehicle with any meaningful clarity."[21] Judge Callahan stated: "Anyone who has ever been in a car in the pitch of night, pitch black . . . nighttime and turns on a dome light, restricts the light. The light does not shine outside. The light does confine itself to the interior of the van or the car." And, as the Court of Appeals pointed out, "Skinner did not testify that the shooter leaned inside the car or was ever located near the door opening while the door was open, such that he would have been more likely to have been illuminated by the interior light."[22] The Court of Appeals panel reasonably concluded that "with the shooter having to shoot through the door window, it is certain that he was positioned on the other side of the door and not near the

[19] *Johnson*, unpub op at 6.

[20] *Id*. at 7.

[21] *Id*. at 6.

[22] *Id*.

door opening, where the light would have been better."[23] In sum, this was a commonsense finding with regard to Skinner's ability to clearly see the shooter's face.[24] Like the Court of Appeals, I cannot conclude that this finding was clearly erroneous.

The majority accepts, and I agree with, the third reason upon which Judge Callahan relied to reject Skinner's credibility.[25] "[C]rimes having an element of dishonesty or false statement are *directly* probative of a witness'[s] truthfulness . . . ."[26] Skinner was not only convicted of a crime of dishonesty, but he was convicted of a crime that is arguably the most relevant to his credibility while under oath—perjury. As the Court of Appeals majority properly concluded, "[T]he fact that [Skinner] had no qualms about violating his oath to tell the truth regarding something as serious as a murder rightfully caused [Judge Callahan] here to be concerned."[27]

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[23] *Id*.

[24] See M Crim JI 3.5(5) (providing that the fact-finder "should only accept things the lawyers say that are supported by the evidence or by your own *common sense* and *general knowledge*") (emphasis added).

[25] Had Judge Callahan based his credibility determination solely on Skinner's criminal record and not considered that record in the context of the other evidence presented at the evidentiary hearing and the trial, I would be more receptive to the majority's view. See *People v Love*, 502 Mich 913 (2018) (ZAHRA, J., dissenting). But that is not the case here. As previously stated, the perjury conviction together with the 16-year lapse of time that allowed for Skinner's memory to fade, Skinner's proximity to the shooter, and the lighting conditions that existed at the time of the shooting combine to strongly support the credibility finding of Judge Callahan.

[26] *People v Allen*, 429 Mich 558, 571; 420 NW2d 499 (1988); see also MRE 609(a)(1) ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and . . . the crime contained an element of dishonesty or false statement . . . .").

[27] *Johnson*, unpub op at 7.

And I agree with the majority that Judge Callahan improperly speculated when surmising that Skinner was likely asleep at the time of the incident. But I conclude that three of Judge Callahan's proffered reasons clearly call Skinner's credibility into question. Accordingly, I cannot conclude that Judge Callahan abused his discretion by denying defendants a new trial on this basis.

Having concluded that defendants are not entitled to relief on their claims of newly discovered evidence under MCR 6.502(G)(2), I would not consider evidence that Johnson presented in previous motions for relief from judgment because "[t]he court may not grant relief to the defendant if the motion . . . alleges grounds for relief which were decided against the defendant in a prior . . . proceeding under this subchapter . . . ." MCR 6.508(D)(2). But, because the majority disagrees and finds Skinner arguably credible, I will further discuss whether, in my view, the new evidence in conjunction with this previously presented evidence makes a different result probable on retrial.

B. THE EFFECTS OF THE NEWLY DISCOVERED EVIDENCE WERE CONSIDERED IN LIGHT OF THE TRIAL EVIDENCE AND PROPERLY REJECTED BY BOTH LOWER COURTS

The majority fails to appreciate the trial evidence that led to defendants' convictions and instead focuses on the evidence set forth during defendants' collateral attacks. The prosecution's cases against Scott and Johnson were unquestionably grounded on circumstantial evidence. The evidence also consistently shows that the prosecution's key witnesses—Burnette and Jackson—were intimidated and reluctant to testify against defendants. A comprehensive examination of the evidence presented at defendants' original proceedings is necessary to demonstrate overall consistency.

1. THE PRELIMINARY EXAMINATION

At the preliminary examination, Burnette's testimony was straightforward. He testified that on May 8, 1999, at around 6:00 p.m., he saw Scott at a store and they returned to Scott's house. Burnette testified that he was waiting for his father to pick him up. At Scott's house, he saw Johnson. At this point during the testimony, the prosecution attempted to elicit testimony from Burnette that defendants told him they planned to "hit a lick." At first, Burnette said he could not recall. Then, notably, the district court interjected and stated the following:

> Officers, I want the courtroom all cleared out. I see people cringing and eye movement and I want as clear a conversation as can be. I don't want any suggestions coming from the audience.
>
> Now, the only one who . . . hasn't been moving around and looking, is that man standing right there, holding his hand, and I will let him stay. Everyone else out.
>
> I heard laughter from back there. I have been watching you all on the front, lady in the green going like this, and the woman with the red hair going like this. All of you out. The only one who hasn't been moving around is this man.

Afterward, the prosecution confronted Burnette with the statement he made to the police:

> [*The Prosecution*]: You recall what you told the investigators about what [Johnson] and [Scott] were talking about that night, correct?
>
> [*Burnette*]: Yes.
>
> * * *
>
> [*The Prosecution*]: Do you remember that now?
>
> [*Burnette*]: Yes.
>
> [*The Prosecution*]: Can you tell the Judge what they told you that night before your daddy came?

[*Scott's Attorney*]: We would object to the witness reading from the statement, your Honor.

The Court: Well, I'll let him read— He doesn't have the statement.

[*The Prosecution*]: I've got the statement.

[*Scott's Attorney*]: He was looking down. I didn't know.

The Court: He's looking down to keep from looking at your clients that keep looking at him and touching their face. I don't know if it's a threat, or sign language within the community, or what.

[*Scott*]: I wasn't doing nothin'.

The Court: Oh, you did like this and you did like this.

[*Scott*]: I have a nervous problem.

The Court: And like this and like that. And the one named Stank, he did like this goes like this, glaring at him. I don't know what those looks in the neighborhood mean. It's just like I don't know what lick means.[28]

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[28] If there is any doubt that defendants were threatening him, it was later resolved during his cross-examination:

The Court: Well, I'm watching [Burnette's] demeanor and it seems like he's scared to death of these two young men that you are representing.

[*Scott's Attorney*]: That may be true, your Honor. That may be the Court's interpretation. Maybe he's not afraid of these guys.

Are you afraid of these men at this time?

[*Burnette*]: Yes.

* * *

[*Scott's Attorney*]: Terrible answer, your Honor.

[*The Prosecution*]: Well—

The Court: Well, I've been sitting here awhile and I've seen a number of cases, and I can usually call it pretty good.

[*Scott's Attorney*]: You did a good job that time.

The prosecution again asked Burnette what defendants told him. Scott's attorney again objected, and the district court overruled the objection. Burnette started to answer, but Scott's attorney interrupted, stating, "I can't hear," which prompted the court to state:

> Come on, young man. I know you're 16 and this is scary for you, but talk into the mic and tell the truth. That's all the Court wants to hear, is the truth. Now, answer the question.

Finally, Burnette replied, "They was [sic] talking about hitting a lick," which he later explained means "[r]obbing somebody." He also mentioned that defendants had asked about his plans that evening, suggesting that he participate, but Burnette declined and mentioned that his father was coming to pick him up.

Burnette then testified that he returned to Scott's house at 2:30 a.m. Defendants were at the house. Burnette testified, reluctantly, that Scott told him "a lady had got shot." Burnette further testified that Scott said "[h]e had a phone bill that he had to pay" and "[s]he wouldn't come out of no money." He testified that Scott had a .22 rifle and that Johnson had an AK-47. Burnette then testified that Scott's girlfriend arrived in the morning and that Scott took the weapon with him, that he heard a trunk pop, and that Scott put the gun in the trunk. Similarly, he testified that Johnson's girlfriend arrived with a sheet and that Johnson wrapped up the gun and put it in the trunk.

Raymond Jackson testified that he knew Scott and that Scott's girlfriend was his neighbor. He testified that he was awoken on May 9, 1999, by a loud noise. He spoke with his grandmother, put on some clothes, looked outside, and saw Scott hand something to his girlfriend. He went outside. Scott joined him, but the police arrived and took Scott and Jackson downtown

for questioning. Later that day, after his interview, Jackson returned home. Johnson stopped over while drinking a 40-ounce beer. Jackson testified that Johnson told him that he and Scott had "hit a lick" and, in Jackson's words, Johnson "implicated" Scott, later explaining that Scott "fucked up and had to shoot."

In binding defendants over for trial, the district court expressly stated, "I just want to say both witnesses are very believable." The court noted that Burnette had admitted in open court that he was afraid of defendants yet still testified. The court also opined that Jackson was afraid and pointed out that he was being held in protective custody but was still housed on the same jail floor as defendants. Apparently, one defendant threatened Burnette with violence and the other taunted him by calling out his name the previous night.

2. JOHNSON'S BENCH TRIAL

Johnson opted for a bench trial. Unlike the majority, I believe we are bound to accept Judge Edwards's findings, none of which can be claimed to be clearly erroneous, and all of which are consistent with the evidence presented at the preliminary examination. After the bench trial, Judge Edwards opined:

> The most important evidence that we received as part of the prosecution's case was that from Antonio [Burnette] and Raymond Jackson. Antonio [Burnette], who apparently also is known by the name of Shortie, gave testimony regarding the fact that he was with this defendant and Kendrick Scott earlier in the evening, and that during the time that he was with the two of them there was a discussion regarding hitting a lick. He indicated that one interpretation or one definition of that term or phrase is pulling a holdup, sticking someone up. And he indicated that he was invited to participate in that activity, and

apparently he declined. He indicated that around 10:30 p.m. his father picked him up and took him to visit some other relatives, and that at around 2:30 a.m. he returned to that area and again was in contact with this defendant and Kendrick Scott. He indicated that at that time, approximately that time this defendant made a statement indicating that Kendrick Scott had shot someone. The reason for the shooting, apparently that was offered was that she would not give up the money. That would suggest that something happened during the holdup that didn't go as planned, and the person was shot.

The statement was made to Antonio, according to his testimony, that Kendrick Scott did the shooting and it was done because the money was not given up. He indicated also that he saw this defendant wrap what appeared to be a long gun in a sheet and later put it in his girlfriend's car. The testimony of Raymond Jackson was somewhat supportive of the testimony given by Antonio [Burnette]. He indicated that he heard the shot outside of his home; he was asleep, he woke up, he went outside. The following day this defendant came to his home and he had [a] conversation with this defendant. And by the way, Raymond Jackson had indicated that he had been drinking. He indicated that when he saw this defendant on that morning, that the defendant appeared to have been drinking also. Raymond Jackson indicated that he been taking some drugs, but he said he did have the conversation with him, and that this defendant said that he had to hit a lick and that he messed up and he had to shoot. He indicated also that he was with Scott, Kendrick Scott at the time that that occurred. Raymond Jackson also told us about the threatening, what he interpreted as being threatening activities of the defendant towards him, threatening remarks that he made after he had been taken down to the lockup at the police station.

* * *

Eugene Jackson, who is the brother of Raymond Jackson testified. He indicated that Raymond had told him

> something about defendant hitting a lick, shooting dice; but he also indicated that he had told his brother that he didn't appreciate, and this happened during the course of the trial, that he did not appreciate how he was testifying. And to that Raymond indicated that he was telling the truth.
>
> We had the defendant Johnson, Mr. Johnson, Justly Johnson testify. He denied any involvement in the shooting. He denied having anything to drink, taking any type of drugs; denied that he made any statements to Antonio [Burnette] or to Raymond Jackson. He indicated that they're lying. He indicated that he did go to the home of Raymond Jackson and that after he was there, he made a phone call; he was on the phone for 6 to 15 minutes, I believe he said, and that he knew that the police were looking for him, and that he went out and turned himself in to the police.

Judge Edwards acknowledged that credibility was the central issue in this case. He found the following in regard to the credibility of Burnette and Raymond Jackson:

> [A]lthough it seems to me that both were very reluctant, and they did everything that they could do to try to minimize the impact that it might have on this defendant.
>
> It appears that they are friendly. It's nothing to suggest that they have any ax to grind, any reason to come into this courtroom and to lie. Testimony of Raymond Jackson, I thought, was very sincere. And in spite of what appears to have been threats from his brother, threats from this defendant, he tried to hedge his testimony in a way that would be favorable to the defense, but he gave what I believed to be very honest and sincere testimony about this defendant's involvement in the offense.
>
> The testimony from [Burnette] was not as forth coming. We had some difficulty even in getting him to keep his voice up so that we could hear. He indeed appeared to me to be a very reluctant witness. He did not want to be a part of this, and that's probably accounted for by the fact that

> he's a good friend. At least at the time that this thing apparently took place, he was a good friend, they were together for a good deal of that evening preceding the shooting and even after the shooting, and the defendant had enough trust in him to confide in him that he was going to hit a lick and later gave information that they did indeed hit a lick, and that someone was shot.

Judge Edwards convicted Johnson of felony murder, assault with intent to rob while armed, and possession of a firearm during the commission of a felony.

The majority erroneously believes that Burnette's prior trial testimonies are not credible because Burnette failed to provide a "consistent narrative" throughout the proceedings. As Burnette began to testify at Johnson's bench trial, it quickly became clear that he would again be a reluctant witness. Contrary to his preliminary examination testimony, Burnette at first denied that Johnson participated in any conversation about "hitting a lick." He also testified that upon returning to Johnson's house at around 2:30 a.m., he and Johnson went to a female's home, got in a car with another person, went to Burnette's sister's house, and found that she was not home, following which Burnette and Johnson returned to Johnson's house. Burnette further testified that after he and Johnson returned to Johnson's house, Scott was there. Burnette testified that there was a conversation and that Johnson said that Scott had shot someone. Burnette denied any indication that Johnson participated in the shooting and stated that he first learned of the shooting when he saw an ambulance and police cars.

This testimony was not given at the preliminary examination. But while Burnette's differing testimony may appear at first to be a non sequitur, after reviewing defense counsel's cross-examination and defendant's closing argument, it becomes clear that Bur-

nette's sentiments, for whatever reason, favored Johnson. That is, Johnson would eventually rely on this "new" testimony to argue that he and Burnette were together without Scott at the time of the murder. Eventually, after the prosecution repeatedly refreshed Burnette's memory with his police statement and his testimony at the preliminary examination, Burnette became more forthcoming and the prosecution was by and large able to elicit testimony comparable with that given at the preliminary examination. And sensing the motive for Burnette's inconsistent testimony, the prosecution laid the following foundation to admit his prior statements:

> [*The Prosecution*]: Have you received any communications, also, about anything that was going to endanger you?
>
> [*Burnette*]: Yes.
>
> [*The Prosecution*]: Okay. And was that after you had given a statement to the police and until today?
>
> [*Burnette*]: Yes.
>
> [*The Prosecution*]: What specifically were you told?
>
> [*Burnette*]: When I got out of lock-up I was going to get killed.
>
> [*The Prosecution*]: Does that trouble you?
>
> [*Burnette*]: Don't bother me.
>
> [*The Prosecution*]: You're not concerned about it?
>
> [*Burnette*]: No, I'm just concerned about my family.
>
> [*The Prosecution*]: Okay. And your family still lives in that same area?
>
> [*Burnette*]: Yes.

Clearly, Burnette's prior statements from the preliminary examination were admissible under MRE 801(d)(1) because he testified at the trial or hearing

and was subject to cross-examination concerning the statement and because the statement was "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . ." The majority fails to acknowledge the obvious "consistent narrative" that explains Burnette's inconsistent testimony, which is that he was under threat during the proceedings.

Judge Callahan expressly stated in his opinion that Judge Edwards "indicated that he was impressed by the testimony of both of those individuals [Burnette and Jackson] when confronted with adverse influences that might have affected them from expressions by the defendants as well as communications that were had with Mr. Jackson by his brother." Also, Judge Edwards did not rely on a single piece of evidence that the majority cites as inconsistent. He rejected this evidence, attributing it to the result of reluctant witnesses who were trying, in his words, "to minimize the impact that [their testimonies] might have on [Johnson]." Judge Edwards explained that witnesses Burnette and Jackson had once been friends with defendants. But after being subpoenaed to testify against defendants, these witnesses received death threats before and during the trials. Judge Edwards sifted through the testimony and discounted the arguably equivocal and inconsistent testimony and found persuasive the circumstantial evidence against defendants. This is exactly the type of finding from a seasoned trial judge that deserves deference. The prosecution takes the witnesses as it finds them. The prosecution rarely has the luxury to parade cooperative witnesses with perfect character into court. This is particularly true in cases that originate in high crime areas, where witnesses fear

retaliation for cooperating with the police. In this case, Judge Edwards observed these witnesses while they testified. He considered their words and the manner in which they were conveyed. In sum, Judge Edwards clearly understood that these witnesses, particularly Burnette, attempted to tailor their testimony to provide Johnson an alibi.[29] Therefore, even assuming that Skinner was credible, his testimony would not make a different result on retrial probable given the evidence that defendants made threats to Burnette and Jackson in connection with their testimony and given that Judge Edwards found Burnette and Jackson to be credible. It is beyond dispute that it is within the province of the fact-finder to resolve a conflict in the evidence.[30]

3. SCOTT'S JURY TRIAL

In addition, the majority compounds its usurpation of Judge Edwards's findings by reviewing the testimony of Burnette and Jackson in Scott's jury trial in light of the so-called inconsistencies between their testimony presented at the preliminary examination and their testimony presented at Johnson's waiver

[29] Burnette's recantation testimony, greatly relied on by the majority, is simply an extension of Burnette walking back his incriminating testimony that Judge Edwards rejected both at Johnson's bench trial and Johnson's second motion for relief from judgment (presenting new evidence that Burnette had recanted his trial testimony). Further, this Court has long stated that "recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true." *People v Van Den Dreissche*, 233 Mich 38, 46; 206 NW 339 (1925) (quotation marks and citation omitted); see also 3 Wright & Welling, Federal Practice and Procedure (4th ed), § 585, pp 480-482 ("The judicial attitude is that recantation should be 'looked on with the utmost suspicion.' ") (citation omitted).

[30] See *People v Henssler*, 48 Mich 49, 51; 11 NW 804 (1882).

trial. The majority does not identify any so-called inconsistencies between these witnesses' testimony presented at the preliminary examination and Scott's jury trial. And the majority does not acknowledge that the evidence against Scott was far stronger than the evidence presented in Johnson's bench trial.

At Scott's trial, Burnette's testimony was concise and given without any apparent reluctance despite the fact that Burnette had continued to receive threats in connection with his involvement. At trial, he recalled additional details; for instance, Burnette testified that Scott knew the victim's first name, that Scott wanted to kidnap her, and that defendants afterward told Burnette the exact location of the shooting. In addition, the prosecution presented testimony from Lillie Harris, William Kindred's sister. Harris was then engaged to Verlin Miller, whose home Kindred had stopped by to discuss purchasing a motorcycle. It was during this conversation that the victim was shot outside the home, and both Kindred and Miller gave chase to a person across a field. Miller at some point called Harris, and she went outside to look for him. Harris testified that at this time a car approached her and that she recognized Scott from the old neighborhood. She testified that Scott called out to her by her nickname, "Peggy," and that she approached the car. Scott then asked her if she saw "two guys run by here with a shotgun." She testified that she was immediately suspicious and that Scott then told her that he saw two guys shoot a lady in a white van, which made her more suspicious. While defense counsel did elicit on cross-examination that she had not mentioned that Scott said anything in her statement to the police, her statement did identify Scott as one of the two people in the car that approached her near the crime scene that evening. The prosecution also presented evidence that a .22 rifle with the name "Snooky" etched into the stock

was discovered in the basement ceiling in the home of Faylynn Kenner, who was Scott's girlfriend at the time. The witnesses who knew Scott only referred to him at trial as "Snooky," "Snoop," or "Snoopy." The jury rendered a verdict of guilty after a mere 1½ hours of deliberation.

The majority has failed to conduct an independent analysis of Scott's trial and has essentially undermined the jury's verdict by relying solely on the so-called inconsistencies presented at Johnson's bench trial, which, again, were rejected by Judge Edwards. With regard to the credibility of witnesses of concern at Johnson's bench trial, namely Burnette and Jackson, both testified about the continued threats made against them before and during Scott's jury trial and yet testified consistently with their testimony given at the preliminary examination.

III. CONCLUSION

I agree with the trial court and the Court of Appeals that defendants' newly discovered evidence is not credible. Even assuming the evidence was credible, I disagree with the majority that this evidence would have made a difference on retrial, particularly in regard to Scott's jury trial in which the evidence, albeit circumstantial, was just short of overwhelming. Accordingly, I would affirm the Court of Appeals' decision that the trial court did not clearly err by denying defendants' motions for relief from judgment.

MCCORMACK, J., did not participate because of her prior involvement in this case as counsel for a party.

WILDER, J., did not participate because he was on the Court of Appeals panel that decided defendants' motions for peremptory reversal.

BERTIN v MANN

Docket No. 155266. Argued on application for leave to appeal April 25, 2018. Decided July 25, 2018.

Kenneth Bertin brought an action against Douglas Mann in the Oakland Circuit Court, alleging that defendant was negligent in operating a golf cart when defendant hit plaintiff with the cart while the parties were playing a round of golf. The parties offered differing accounts of how the accident occurred. Plaintiff alleged that he had parked the cart and begun walking to his ball when he was suddenly struck by the cart driven by defendant, at which point plaintiff fell to the ground and was hit a second time with the cart. Defendant alleged that when he began accelerating, plaintiff stepped in front of the cart and was hit. Before trial, plaintiff filed a motion in limine arguing that the court should hold defendant negligent as a matter of law. Defendant responded by arguing that the proper standard of care was "reckless misconduct" under *Ritchie-Gamester v City of Berkley*, 461 Mich 73 (1999), because the parties were coparticipants in a recreational activity when the accident occurred. The court, Martha D. Anderson, J., denied the motion but did not resolve the applicable standard of care. The issue arose again when the parties filed jury instructions, with plaintiff proposing an instruction on negligence and defendant proposing an instruction on reckless misconduct, and the court concluded that reckless misconduct was the appropriate standard. At trial, the jury found that defendant's action did not constitute reckless misconduct. Plaintiff appealed in the Court of Appeals, and the Court of Appeals, GADOLA, P.J., and FORT HOOD and RIORDAN, JJ., reversed, holding that the ordinary-negligence standard should have been applied because the risks posed by the golf cart were not inherent in the game of golf. 318 Mich App 425 (2016). The Court of Appeals rejected the argument that inherent risks were merely foreseeable risks, instead holding that "inherent" means something necessary or intrinsic to the activity, without which the activity could not take place. Given the relatively recent advent of the golf cart, the lack of any official rule referring to carts as inherent aspects of golf, and the fact that there was no evidence in the instant case that the golf course where the accident occurred required the use of golf carts, the

Court of Appeals concluded that risks associated with carts were not inherent to golf. Accordingly, the Court of Appeals, finding a question of fact regarding defendant's negligence, vacated the jury verdict and remanded the case to the trial court. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 869 (2017).

In a unanimous opinion by Justice VIVIANO, the Supreme Court, in lieu of granting leave to appeal, *held*:

Coparticipants in a recreational activity owe each other a duty not to act recklessly. However, this standard only applies to injuries that arise from risks inherent to the activity. Whether a risk is inherent to a recreational activity depends on whether a reasonable person under the circumstances would have foreseen the particular risk that led to the injury. If a reasonable person could have foreseen the particular risk, then the risk is inherent and the reckless-misconduct standard applies. The risk must be defined by the factual circumstances of the case—it is not enough that the participant could foresee being injured in general; the participant must have been able to foresee that the injury could arise through the mechanism it resulted from. The factual circumstances to be considered include, among other things, the general characteristics of the participants, such as their relationship to each other and to the activity and their experience with the sport. The general rules of the activity can also be considered; however, those rules are not dispositive, and it is also relevant whether the participants engaged in any regular departures from the rules or other practices not accounted for by the rules. Also relevant are any regulations prescribed by the venue at which the activity is taking place. Accordingly, "inherent risks" under *Ritchie-Gamester* are those that are reasonably foreseeable under the circumstances of the case. In this case, the Court of Appeals erred by meditating upon golf's essence and discerning that golf carts are not within the essence of the sport. This approach is not suited to judicial decision-making, or even legal reasoning, because it represents a sort of philosophical essentialism that posits the existence of abstract essences that courts must discern. Judges have no special insight regarding the nature of golf and, in general, should not be in the business of policing the boundaries of sports. Instead, the proper analysis is whether the risk was reasonably foreseeable. Therefore, the case had to be remanded to the Oakland Circuit Court for that court to determine whether there was a genuine issue of material fact that a participant in the activity in question would, under the circumstances, have

reasonably foreseen the risk of this particular injury. If the court finds that there is no genuine issue of material fact that the risk was reasonably foreseeable and the recklessness standard applies, defendant is entitled to the benefit of the jury verdict finding that he was not reckless, and the case shall be dismissed. Conversely, if the trial court finds that there is no genuine issue of material fact that the risk was not reasonably foreseeable and the negligence standard applies, plaintiff is entitled to a new trial. Finally, if the trial court finds a genuine issue of material fact regarding the foreseeability of the risk, the court shall undertake further proceedings not inconsistent with this opinion.

Reversed and remanded.

ACTIONS — PERSONAL INJURY — RECREATIONAL ACTIVITIES — INHERENT RISKS — STANDARD OF CARE.

Coparticipants in a recreational activity owe each other a duty not to act recklessly; the reckless-misconduct standard only applies to injuries that arise from risks inherent to the activity; whether a risk is inherent to a recreational activity depends on whether a reasonable person under the circumstances would have foreseen the particular risk that led to the injury; if a reasonable person could have foreseen the particular risk, then the risk is inherent and the reckless-misconduct standard applies; the risk must be defined by the factual circumstances of the case, including the general characteristics of the participants, such as their relationship to each other and to the activity and their experience with the sport, the general rules of the activity (although those rules are not dispositive, and it is also relevant whether the participants engaged in any regular departures from the rules or other practices not accounted for by the rules), and any regulations prescribed by the venue at which the activity is taking place.

Bendure & Thomas, PLC (by *Mark R. Bendure*) and the *Law Offices of Kelman & Fantich* (by *Brian L. Fantich*) for plaintiff.

Secrest Wardle (by *Sidney A. Klingler*) for defendant.

VIVIANO, J. At issue in this tort case is whether getting hit by a golf cart is an inherent risk of golfing. If so, then defendant, who ran over plaintiff with a cart while golfing, owed a duty only to refrain from reckless

misconduct, but cannot be held liable for negligent conduct. If not, then defendant will be held to the negligence standard of conduct. The question boils down to how we determine which risks in a recreational activity are inherent, such that the reckless standard of conduct applies. The Court of Appeals answered this question by meditating upon golf's essence and discerning that golf carts are not within the essence of the sport. We decline to endorse this philosophical mode of analysis. Instead, when determining whether a risk is inherent in a recreational activity for purposes of establishing the relevant standard of conduct, the fact-finder should ask whether the risk was reasonably foreseeable. Because the courts below did not apply this test, we reverse the judgment of the Court of Appeals and remand the case to the trial court for consideration of this issue.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant were enjoying a round of golf together on May 22, 2013, when defendant hit plaintiff with the golf cart they had been using to navigate the course. The parties offer differing accounts of how the accident occurred. Plaintiff testified that he had been doing most of the driving that day. On the eighth hole of their round, defendant's shot landed on the green while plaintiff's golf ball was in the rough nearby. According to plaintiff, he parked the cart 10 to 15 feet behind his ball, with defendant remaining in the passenger seat. Plaintiff hit his shot and began walking directly to his ball when he was suddenly struck by the cart driven by defendant. Plaintiff fell to the ground, and the cart hit him a second time, rolling over his right leg. For his part, defendant testified that although he had not looked to see where plaintiff was when he began

driving, he believed plaintiff was behind the cart and to the right. When he began accelerating, plaintiff stepped in front of the cart and was hit, although defendant did not recall running over plaintiff's leg.

Plaintiff filed the present case in April 2014, alleging that defendant was negligent in operating the golf cart. Prior to trial, plaintiff filed a motion in limine arguing that the court should hold defendant negligent as a matter of law. Defendant responded by arguing, among other things, that negligence was not the appropriate standard of care. Instead, under this Court's decision in *Ritchie-Gamester v City of Berkley*,[1] the proper standard was "reckless misconduct" because the parties were coparticipants in a recreational activity when the accident occurred. The trial court denied plaintiff's motion but did not resolve the applicable standard of care. The issue arose again, however, when the parties filed jury instructions. Plaintiff proposed an instruction on negligence—the ordinary standard of care—and defendant once more sought the *Ritchie-Gamester* reckless-misconduct standard. This time, the court concluded that reckless misconduct was the appropriate standard. At trial, the jury found that defendant's action did not constitute reckless misconduct.

The Court of Appeals reversed, holding that the ordinary-negligence standard should have been applied because "the risks posed by the golf cart were not risks inherent in the game of golf."[2] Noting that Michigan caselaw had not defined a precise approach to determining the "inherent" risks of a recreational activity, the Court looked to various dictionary definitions of the term "inherent," as well as foreign caselaw

[1] *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999).

[2] *Bertin v Mann*, 318 Mich App 425, 438; 898 NW2d 243 (2016).

analyzing that term in the context of recreational sports.[3] The Court explicitly rejected the argument that "inherent" risks were merely foreseeable risks.[4] Instead, "inherent" was taken to mean something necessary or intrinsic to the activity, without which it could not take place.[5] Given the relatively recent advent of the golf cart, the lack of any official rule referring to carts as inherent aspects of golf, and the "fact that there is no evidence in the instant case that the golf course where the accident occurred *required* the use of golf carts," the Court concluded that risks associated with carts were not inherent to golf.[6] Put differently, carts could be banned and golf would "remain virtually unchanged," and so they did not pose an inherent risk.[7] Accordingly, the Court, finding a question of fact regarding defendant's negligence, vacated the jury verdict and remanded.

Defendant sought leave to appeal in this Court, and we ordered briefing "addressing whether the reckless misconduct standard of care or the ordinary negligence standard of care applies to an injury resulting from the operation of a golf cart while playing golf recreationally. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 87-89 [597 NW2d 517] (1999)."[8]

II. STANDARD OF REVIEW

We review de novo the interpretation of a common-law doctrine.[9]

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[3] *Id*. at 438-447.

[4] *Id*. at 444 n 11.

[5] *Id*. at 444.

[6] *Id*.

[7] *Id*. at 446.

[8] *Bertin v Mann*, 501 Mich 869, 869-870 (2017).

[9] *Tkachik v Mandeville*, 487 Mich 38, 45; 790 NW2d 260 (2010).

III. ANALYSIS

Our caselaw holds that "coparticipants in a recreational activity owe each other a duty not to act recklessly."[10] But this standard only applies to injuries that arise from risks inherent to the activity.[11] We have never explained how to determine whether a particular risk is inherent, and we now take the opportunity to do so.[12]

A. *RITCHIE-GAMESTER*

We established our general approach to the reckless-misconduct standard in *Ritchie-Gamester*. There, the parties were participating in an "open skating" period at an ice arena when the defendant, skating backwards, ran into the plaintiff, knocking her down and causing serious injuries.[13] In deciding whether to retain the ordinary-negligence standard for claims made in these general circumstances, or to adopt a reckless-misconduct standard, we noted that the majority of jurisdictions had opted for the latter.[14] The reasons for the rule were many, including the participants' "consent" to the inherent risks, their participation with "notice" of the rules "sufficient to discharge the other

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[10] *Ritchie-Gamester*, 461 Mich at 95.

[11] *Id*. at 87.

[12] No party disputes that golf is a recreational activity or that plaintiff and defendant were coparticipants in that activity.

[13] *Ritchie-Gamester*, 461 Mich at 75.

[14] *Id*. at 81-82 ("In the majority of other jurisdictions, however, the courts have adopted a 'reckless or intentional conduct' or a 'wilful and wanton or intentional misconduct' standard."); see also 1 Lindahl, Modern Tort Law: Liability and Litigation (2d ed, 2018 update), § 3:71 ("[A] majority of courts hold that participants in an athletic event owe a duty to other participants to refrain from reckless misconduct and that liability may be based on the breach of such duty.").

participants' duty of care," their creation of an "implied contract," or their "assum[ption]" of the inherent risks.[15] Underlying all of these rationales was the observation that "[w]hen people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity."[16] With regard to those risks, we held that coparticipants owed a duty only to refrain from reckless misconduct.[17]

Our opinion in *Ritchie-Gamester* did not expressly establish the proper analysis for assessing whether a particular risk is inherent in an activity. But as the Court of Appeals noted below, our Court did use language suggestive of two different ways to approach this inquiry.[18] The first, and more extensive, discussion focused on foreseeability. As an example of an inherent risk, *Ritchie-Gamester* cited a Texas case, which noted that " 'shanking the ball [in golf] is a foreseeable and not uncommon occurrence.' "[19] Later, we said "we suspect that reasonable participants recognize that skill levels and play styles vary, and that an occasional injury is a foreseeable and natural part of being involved in recreational activities . . . ."[20] In another place, we noted that "no liability will arise unless a participant's actions exceed the normal bounds of conduct associated with the activity."[21]

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[15] *Ritchie-Gamester*, 461 Mich at 86-87.

[16] *Id*. at 87.

[17] *Id*. at 89.

[18] *Bertin*, 318 Mich App at 444 n 11 (citing *Ritchie-Gamester* and noting that it "implicitly recogniz[ed] a difference between something's being foreseeable and being natural").

[19] *Ritchie-Gamester*, 461 Mich at 88, quoting *Hathaway v Tascosa Country Club, Inc*, 846 SW2d 614, 616 (Tex App, 1993) (quotation marks omitted).

[20] *Ritchie-Gamester*, 461 Mich at 94.

[21] *Id*.

We also relied on the analysis set out by Justice Cardozo in *Murphy v Steeplechase Amusement Co*,[22] which indicated that foreseeability was the touchstone for assessing risk in these circumstances. In *Steeplechase*, a customer at an amusement park was injured after falling in "the Flopper," which consisted of a moving belt that made it difficult to remain standing. Justice Cardozo established the general rule that "[o]ne who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious as necessary, just as a fencer accepts the risk of a thrust by his antagonist . . . ."[23] The plaintiff could see participants tumbling about when he decided to join them—"He took the chance of a like fate . . . ."[24] It was important to the analysis that the risks were obvious, as Justice Cardozo noted the case might be different "if the dangers inherent in the sport were obscure or unobserved."[25] By relying on this case in *Ritchie-Gamester*, we indicated our approval of its approach, stating: "Justice Cardozo's observations apply just as well to the conduct of coparticipants in a recreational activity as they do to the conduct of a person enjoying an amusement park ride. . . . In all these activities, there are foreseeable, built-in risks of harm."[26]

In contrast to its rather frequent references to the concept of foreseeability, *Ritchie-Gamester* barely discussed or distinguished a second possible way to approach the analysis, which would ask whether the risk arose from a necessary or essential aspect of the

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[22] *Murphy v Steeplechase Amusement Co, Inc*, 250 NY 479; 166 NE 173 (1929).

[23] *Id*. at 482.

[24] *Id*. at 483.

[25] *Id*.

[26] *Ritchie-Gamester*, 461 Mich at 87-88.

activity. Our only reference to this more demanding approach to risks was our use of the term "inherent" to describe the type of risks subject to the reckless-misconduct standard.[27] While we never defined "inherent" as absolutely essential to the activity, the Court of Appeals in this case did, turning to dictionaries to determine that "inherent risk" means a risk " 'necessarily entailed in a given activity . . . .' "[28] The Court of Appeals further defined "inherent" as involving the " 'constitution or essential character of something,' "[29] or something existing " 'as a permanent and inseparable element, quality, or attribute[.]' "[30] But *Ritchie-Gamester* never emphasized the word "inherent."[31]

B. FORESEEABILITY

While *Ritchie-Gamester* did not explicitly adopt a mode of analysis for determining which risks were

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[27] See, e.g., *id*. at 86-87.

[28] *Bertin*, 318 Mich App at 438, quoting *Black's Law Dictionary* (10th ed). The Court noted that *Black's* also defined "inherent risk" as " '[a] fairly common risk that people normally bear whenever they decide to engage in a certain activity.' " *Bertin*, 318 Mich App at 438, quoting *Black's Law Dictionary* (10th ed). That definition, more in line with the foreseeability approach—as it looks to the commonality of the risk rather than the risk's necessity to the activity—was not discussed further by the Court of Appeals.

[29] *Id*. at 439, quoting *Merriam-Webster's Collegiate Dictionary* (11th ed).

[30] *Id*., quoting *Random House Webster's Unabridged Dictionary* (2d ed).

[31] Other courts have treated the word "inherent" as synonymous with "foreseeable." Cf. *Demelio v Playmakers, Inc*, 19 Misc 3d 911, 913; 855 NYS2d 878 (2008) ("[T]here is no indication in any of the authorities that the [foreseeability] formulation differs in substance from the 'inherency' . . . standard[]. . . . [T]he risks that 'inhere' in a sport or recreational activity are 'reasonably foreseeable consequences.' "). This is consistent with one of the dictionary definitions of "inherent" that the Court of Appeals disregarded below. See note 28 of this opinion and *Black's Law Dictionary* (10th ed), p 1524.

"inherent" in a recreational activity, its frequent mentions of foreseeability point in the right direction. For the reasons that follow, we now hold that the analysis must focus on whether the risk was reasonably foreseeable under the circumstances.

Ritchie-Gamester adopted the reckless-misconduct standard because it reflects the participants' expectations when they voluntarily subject themselves to the risks in an activity.[32] As a leading treatise notes, "The limited duty or standard of care is derived directly from the plaintiff's limited expectations of safety."[33] This reasoning naturally lends itself to a foreseeability test: because the rationale for the limited duty is that the participants have voluntarily elected to participate knowing that they might be injured, it makes sense to define the "inherent risks" in an activity by what is reasonably foreseeable—by what the participants did foresee or should have foreseen—rather than a court's metaphysical ponderings about the essence of the sport.[34] In other words, to the extent the lower standard of care is justified by a participant's consent to certain risks, it follows that the relevant risks are the ones that the participant knew or should have known about.[35] For these reasons, in cases like this, numerous

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[32] *Ritchie-Gamester*, 461 Mich at 87; see also *Steeplechase*, 250 NY at 482-483 (explaining that the plaintiff could see the risk of injury with his own eyes before he participated).

[33] 1 Dobbs, Hayden & Bublick, Torts (2d ed), § 240, p 865.

[34] This rule is consistent with using the phrase "inherent risk," which as noted in note 28 of this opinion can mean "[a] fairly common risk . . . ." *Black's Law Dictionary* (10th ed). See also note 31 of this opinion.

[35] The Restatement explains the related doctrine of implied assumption of risk in this manner, grounding it on the fact that a plaintiff "fully understands a risk of harm to himself . . . and . . . nevertheless voluntarily chooses to enter or remain . . . ." 2 Restatement Torts, 2d, § 496 C, pp 569-570. The relevant question is "what the plaintiff knows, understands, and is willing to accept." *Id*. at § 496C, comment *e*, p 571; see also

courts ask whether a risk was reasonably foreseeable or obvious,[36] including in cases involving

Wharton, A Treatise on the Law of Negligence (2d ed), § 200, p 181 (noting the "general principle that a party cannot recover for injury he incurs in risks, themselves legitimate, to which he intelligently submits himself"). As one treatise states, implied assumption of risk (i.e., when there has been no express agreement to assume a risk) still requires the injured participant to have known and appreciated the risk, but such knowledge will be imputed to the participant if the risk was "clear and obvious" or, in other words, reasonably foreseeable. Prosser & Keeton, Torts (5th ed), § 68, pp 487-488; see also Dobbs, § 236 (noting that the standard was whether "a reasonable person in her [i.e., the plaintiff's] position would have appreciated" the risk).

While *Ritchie-Gamester*, 461 Mich at 87, did not state that its standard was based only on the assumption-of-risk doctrine, it noted the similar underpinnings—the voluntary consent of the participants—shared by that doctrine and the lower standard of care in the present context. Therefore, to the extent the rationales are similar, the doctrine is useful in understanding cases like the present one, although the doctrine (fully immunizing a defendant rather than merely reducing the defendant's standard of care) has been abolished in this context. See *Ritchie-Gamester*, 461 Mich at 78 (noting that *Felgner v Anderson*, 375 Mich 23; 133 NW2d 136 (1965), "abolished assumption of risk in this context," after which the caselaw "began to move away from the 'ordinary care' standard").

[36] Some of the following cases involved the liability of nonparticipants, such as owners of golf courses, but all examined the same basic question as the one here, i.e., how to determine which risks are inherent. See, e.g., *Yoneda v Tom*, 110 Hawaii 367, 373; 133 P3d 796 (2006) (" '[T]he defense [of assumption of risk] applies to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation[,] except for acts which are reckless or intentional.' "), quoting *Foronda v Hawaii Int'l Boxing Club*, 96 Hawaii 51, 62; 25 P3d 826 (App, 2001) (first and third alterations in original); *Thompson v McNeill*, 53 Ohio St 3d 102, 104; 559 NE2d 705 (1990) ("Thus a player who injures another in the course of a sporting event by conduct that is a foreseeable, customary part of the sport cannot be held liable for negligence . . . ."), abrogated on other grounds by *Anderson v City of Massillon*, 134 Ohio St 3d 380 (2012); *Maddox v City of New York*, 66 NY2d 270, 278; 487 NE2d 553 (1985) ("There is no question that the doctrine [of assumption of risk] requires not only knowledge of the injury-causing defect but also appreciation of the resultant risk . . . . It is not necessary to the application of assumption of risk that the injured

golf cart accidents.[37]

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plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results."); *Simmons v Quarry Golf Club, LLC*, 2016-Ohio-525, ¶ 20; 60 NE3d 454 (Ohio App, 2016) (" 'The types of risks associated with [an] activity [for purposes of assumption of risk] are those that are foreseeable and customary risks of the . . . recreational activity.' ") (citation omitted; first and third alterations in original); *American Powerlifting Ass'n v Cotillo*, 401 Md 658, 670; 934 A2d 27 (2007) (" '[V]oluntary participants in sports activities may be held to have consented, by their participation, to those injury-causing events which are known, apparent, or reasonably foreseeable consequences of their participation.' "), quoting *Conway v Deer Park Union Free Sch Dist No 7*, 234 App Div 2d 332, 332; 651 NYS2d 96 (1996); *Hathaway*, 846 SW2d at 616 (applying the standard from *Thompson* asking whether the risk was foreseeable and customary); 27A Am Jur 2d, Entertainment and Sports Law, § 91, p 491 ("A voluntary participant in any lawful game, sport, or contest, in legal contemplation by the fact of his or her participation, assumes all risks incidental to the particular game, sport, or contest which are obvious and foreseeable[.]"); see also *Pfenning v Lineman*, 947 NE2d 392, 398, 404 (Ind, 2011) (addressing claims against a participant of a sport by examining the breach of duty—the existence of which includes asking whether harm is reasonably foreseeable—and holding that "if the conduct of [the] participant is within the range of ordinary behavior of participants in the sport, the conduct is reasonable as a matter of law and does not constitute a breach of duty").

[37] One case, decided shortly before the Court of Appeals' decision below, determined that an accident between golf carts driven by coparticipants was an inherent risk. *Wooten v Caesars Riverboat Casino, LLC*, 63 NE3d 1069, 1076 (Ind App, 2016). The rationale was that golf cart usage was "part and parcel of the modern golf game, with an unremitting presence on the fairway," and accidents between golf carts were "common and expected." *Id*. Consequently, such risk was " 'within the range of ordinary behavior of participants' in golf and therefore, as a matter of law, it cannot support a claim for negligence." *Id*., quoting *Pfenning*, 947 NE2d at 404. See also *Valverde v Great Expectations, LLC*, 131 App Div 3d 425, 426; 15 NYS3d 329 (2015) (holding that " '[g]olfers . . . must be held to a common appreciation of the fact that there is a risk of injury from improperly used carts on a fairway which is inherent in and aris[es] out of the nature of the sport' "), quoting *Brust v Town of Caroga*, 287 App Div 2d 923, 925; 731 NYS2d 542 (2001). We do not comment on whether these cases were correctly decided; rather, we highlight them to demonstrate that the foreseeability framework has been applied in similar cases.

An approach based on foreseeability has the further benefit that it is common in the law, unlike speculation about the essence of a sport. We recently relied on the well-established definition of "foreseeability" in *Iliades v Dieffenbacher North America Inc* to explain that "[u]nder Michigan common law, foreseeability depends on whether a reasonable person 'could anticipate that a given event might occur under certain conditions.' "[38] In the context of other torts, the foreseeability of consequences is used as the standard for proximate causation.[39] Similarly, we have stated that "determining whether a duty exists" in a negligence claim depends on, among other things, "the foreseeability and nature of the risk."[40] Accordingly, our law frequently requires assessing the foreseeability of risks and events, and courts are familiar with the analysis.[41]

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[38] *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 328; 915 NW2d 338 (2018), quoting *Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975).

[39] See, e.g., *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994) ("On the other hand, legal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.").

[40] *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993); see also *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977) (noting that the concepts of duty and proximate cause are related, as each "depend[s] in part on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable").

[41] It is also consistent with statutes on this topic. The Legislature has consistently defined "inherent risk" as including dangers involving technology or equipment not essential to an activity—for example, collisions with ski-tower components and snow-grooming equipment are inherent risks of skiing. MCL 408.342(2) ("Each person who participates in the sport of skiing accepts the dangers that inhere in the sport insofar as the dangers are obvious and necessary," including "collisions with ski lift towers and their components, with other skiers, or with" various property and equipment such as snow-making or snow-grooming equip-

The approach adopted by the Court of Appeals below, asking whether a risk arose from a necessary or essential aspect of the game, is flawed for multiple reasons. Most importantly, it is not an approach suited to judicial decision-making, or even legal reasoning. Instead, it represents a sort of philosophical essentialism that posits the existence of abstract essences that courts must discern.[42] There is, under this thinking, an ideal form of golf, or any other recreational activity. What the Court of Appeals did here was examine this ideal of golf, asking whether it included golf carts.[43]

This manner of reasoning is better left to philosophers than judges. In his dissent in *PGA Tour, Inc v Martin*, Justice Scalia explained why.[44] In that case, the plaintiff challenged the PGA Tour's ban on golf

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ment.). See also MCL 445.1725 (providing that a participant "in roller skating accepts the danger that inheres in that activity insofar as the dangers are obvious and necessary," including collisions with objects "properly" placed within the path of the roller skater); MCL 324.82126(8) (providing that individuals participating in snowmobiling accept "risks associated with that sport insofar as the dangers are obvious and inherent," including the risk of injuries arising from both natural and artificial objects); MCL 691.1736 (providing that participants in trampolining "accept[] the danger that inheres in that activity insofar as the dangers are obvious and necessary," including injuries involving "objects or artificial structures properly within the intended travel of the trampoliner"). What these statutes demonstrate is that "inherent risk" is linked not to a narrowly defined essence of an activity, but rather to the participants' reasonable expectations.

[42] See Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell, 8th ed, 2008), p 34 ("Essentialism . . . has a history stretching back to Plato's notion of ideal universals, namely, the notion that every class or group of things has an essential or fundamental nature, common to every member of the class, and that the process of defining consists in isolating and identifying this common nature or intrinsic property.").

[43] *Bertin*, 318 Mich App at 446.

[44] *PGA Tour, Inc v Martin*, 532 US 661; 121 S Ct 1879; 149 L Ed 2d 904 (2001).

carts in tournament play, requesting an accommodation under the Americans with Disabilities Act on the ground that allowing him to ride in a cart would not "fundamentally alter the nature" of the golf tournaments.[45] The majority agreed, holding that golf cart usage would not fundamentally alter the nature of the game.[46] In dissent, Justice Scalia explained that sports are social constructs—they lack an essential character that is immutable.[47] The sport's players and rulemakers can change how the game is played for any reason or no reason at all, and the "nature" of the game will change accordingly. If, as the majority assumed, the PGA Tour was obligated "to play classic, Platonic golf," then the Court was faced with "an awesome responsibility":

> It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power "[t]o regulate Commerce with foreign Nations, and among the several States," to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a "fundamental" aspect of golf.
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> Either out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly

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[45] 42 USC 12182(b)(2)(A)(ii); see *Martin*, 532 US at 664-665.

[46] *Martin*, 532 US at 690-691.

[47] *Id*. at 699-700 (Scalia, J., dissenting).

> difficult and incredibly silly question. To say that something is "essential" is ordinarily to say that it is necessary to the achievement of a certain object. But since it is the very nature of a game to have no object except amusement (that is what distinguishes games from productive activity), it is quite impossible to say that any of a game's arbitrary rules is "essential." Eighteen-hole golf courses, 10-foot-high basketball hoops, 90-foot baselines, 100-yard football fields—all are arbitrary and none is essential. The only support for any of them is tradition and (in more modern times) insistence by what has come to be regarded as the ruling body of the sport . . . .[48]

Our case is different, but the lesson is the same. In both *Martin* and the present matter, the judiciary has been asked to define the essence of a sport. Judges have no special insight regarding the nature of golf and, in general, should not be in the business of policing the boundaries of sports. Rather than requiring courts to engage in such a nebulous endeavor, we hold that the proper analysis should focus on reasonable foreseeability.

C. ASSESSING FORESEEABILITY

In this context, the assessment of whether a risk is inherent to an activity depends on whether a reasonable person under the circumstances would have foreseen the particular risk that led to injury. If so, then the risk is inherent and the reckless-misconduct standard of care applies. The foreseeability of the risk is a question of fact, and it is useful to describe a few of the considerations that should inform the determination.[49]

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[48] *Id*. at 700-701 (citation omitted).

[49] Foreseeability, in similar contexts, has been treated as a factual issue. See *Lego v Liss*, 498 Mich 559, 562-563; 874 NW2d 684 (2016) (noting that there was "no question of material fact" regarding the

As an initial matter, it is the risk of harm that must be reasonably foreseeable.[50] The Court of Appeals below focused broadly on the use of carts in golf rather than the risk of being hit by one. While the questions are not unrelated—the prevalence of carts might indicate a more obvious and increased risk of accident—the proper analysis centers on whether a reasonable person in the position of the injured participant could have foreseen that risk. The test is objective and focuses on what risks a reasonable participant, under the circumstances, would have foreseen.[51] The risk must be de-

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foreseeability of a police officer's getting shot by a fellow officer while engaging a shooter, and thus holding that the plaintiff's injury arose from an inherent risk under MCL 600.2966 and the defendant was immune from liability). And factual disputes regarding the applicable standard of care have likewise been treated as factual issues. Cf. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 595; 614 NW2d 88 (2000) ("As a general rule, if there is evidence from which invitee status [which determines the level of duty a defendant owes] might be inferred, it is a question for the jury."), citing *Nezworski v Mazanec*, 301 Mich 43, 58; 2 NW2d 912 (1942) (noting that whether the plaintiff was an invitee or trespasser for purposes of determining the defendant's duty was a question of fact). Of course, if no genuine issue of material fact remains, then a court can decide the issue under MCR 2.116(C)(10).

[50] See *Maddox*, 66 NY2d at 278 ("It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results.").

[51] *Yoneda*, 110 Hawaii at 373 ("'The inquiry into what constitutes an inherent risk 'is *an objective one*, and must be, for the vagaries of prior knowledge or perception of risk would undermine the doctrine's underlying policy[] that the law should not place unreasonable burdens on the free and vigorous participation in sports[.]' "), quoting *Foronda*, 96 Hawaii at 67 (alterations in original); see generally *Iliades*, 501 Mich at 338 (focusing on a reasonable person); cf. 2 Restatement Torts, 2d, § 289, p 41 (providing, in the context of establishing a standard of reasonable conduct, that an actor is required to foresee risks "if a reasonable man would [recognize the risk] . . . while exercising . . . such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have").

fined by the factual circumstances of the case—it is not enough that the participant could foresee being injured in general; the participant must have been able to foresee that the injury could arise through the "mechanism" it resulted from.[52] Relatedly, those factual circumstances include the general characteristics of the participants, such as their relationship to each other and to the activity[53] and their experience with the sport.[54]

The general rules of the activity can also be considered, as the Court of Appeals did here; but those rules are not dispositive, and it is also relevant whether the participants engaged in any regular departures from the rules or other practices not accounted for by the rules.[55] Also relevant are any regulations prescribed by

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[52] *Maddox*, 66 NY2d at 278; see also *Cooperman v David*, 214 F3d 1162, 1167 (CA 10, 2000) (noting, under a Wyoming statute providing a defense for "inherent risks," that the risk could not be considered "in a vacuum, apart from the factual setting," and instead must be defined with the "specificity permitted by the factual record").

[53] *Yoneda*, 110 Hawaii at 373 (" 'In determining whether the defendant's conduct is an inherent risk of the sports activity, *we consider the nature of the activity, the relationship of the defendant to the activity and the relationship of the defendant to the plaintiff*.' "), quoting *Foronda*, 96 Hawaii at 66.

[54] *Maddox*, 66 NY2d at 278 ("[A]wareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff . . . .").

[55] See, e.g., *Lux v Cox*, 32 F Supp 2d 92, 102 (WDNY, 1998) ("In conducting this analysis, the court may consider such factors as the accepted and applicable rules or standards of the sport, published guidelines, evidence of common usage, conditions that exist at similar facilities, proof of prior accidents at the same place under substantially similar circumstances, or the absence of prior accidents, or other relevant factors."). The formal or informal rules may be consulted, but they are not the dispositive criterion in determining what is foreseeable. As *Ritchie-Gamester* pointed out, using the rules in this manner would fail to reflect the reasonable expectations of participants, who surely anticipate injuries regardless of how the rules "are structured and enforced." *Ritchie-Gamester*, 461 Mich at 94. As one scholar has noted, "[E]ven violation of

the venue at which the activity is taking place. In this case, for example, the Court of Appeals correctly considered whether the use of golf carts was required,[56] and it is also relevant whether golf carts were banned or confined to certain areas of the course.[57] In sum, the usual approach to reasonable foreseeability applies in the present context.

IV. CONCLUSION

For the reasons above, we hold that "inherent risks" under *Ritchie-Gamester* are those that are reasonably foreseeable under the circumstances of the case. When an injury arises from such a risk, the recklessness-misconduct standard applies. Accordingly, we remand this case to the Oakland Circuit Court for that court to determine whether there is a genuine issue of material fact as to whether a participant in the activity in question would, under the circumstances, have reasonably foreseen the risk of this particular injury. If the court finds that there is no genuine issue of material fact that the risk was reasonably foreseeable and the recklessness standard applies, defendant is entitled to the benefit of the jury verdict finding that he was not reckless, and the case shall be dismissed. Conversely, if the trial court finds that there is no genuine issue of material fact that the risk was not reasonably foreseeable and the negligence standard applies, plaintiff is entitled to a new trial. Finally, if the trial court finds a

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a rule of the game does not in itself result in liability; if the violation is one that is ordinary to the way the game is played, the defendant will be liable only if he is reckless or intends harm." Dobbs, § 240, p 866.

[56] *Bertin*, 318 Mich App at 444.

[57] See, e.g., *Forman v Kreps*, 2016-Ohio-1604, ¶¶ 27-31; 50 NE3d 1 (Ohio App, 2016) (noting, with regard to the assumption of risk, arguments regarding a golf course's customs and requirements regarding golf carts).

genuine issue of material fact regarding the foreseeability of the risk, the court shall undertake further proceedings not inconsistent with this Court's opinion.[58]

MARKMAN, C.J., and ZAHRA, MCCORMACK, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred with VIVIANO, J.

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[58] Plaintiff has alternatively argued that *Ritchie-Gamester* is inapplicable because the golf cart here was subject to the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*., and thus the standard of care is ordinary negligence. See *Van Guilder v Collier*, 248 Mich App 633; 650 NW2d 340 (2001). The Court of Appeals determined that the MVC did not apply to the golf cart or parties at issue. *Bertin*, 318 Mich App at 437-438. We see no clear error in the Court of Appeals' analysis, and therefore we decline to reach this issue.

PEOPLE v SMITH

Docket No. 156353. Argued on application for leave to appeal January 11, 2018. Decided July 26, 2018.

State Senator Virgil Smith pleaded guilty in the Wayne Circuit Court to malicious destruction of property, MCL 750.377a(1)(a)(*i*). Smith's plea agreement included the dismissal of three charges against him—domestic violence, MCL 750.81(2); felonious assault, MCL 750.82; and carrying a firearm during the commission of a felony, MCL 750.227b. Smith was sentenced to a 10-month jail term and 5 years of probation. As part of the plea agreement, Smith agreed to resign from his senate seat and to refrain from running for public office during his 5-year probationary period. At sentencing, the court, Lawrence S. Talon, J., sua sponte declared that the parts of the plea agreement requiring Smith to resign from office and to refrain from seeking public office during his probationary period were void because they offended Michigan's constitutional separation of powers, infringed the public's right to elect the representatives of their choice, were contrary to public policy, and compromised the integrity of the court. In all other respects, the court approved the plea agreement and sentenced Smith as previously indicated. The prosecutor moved to vacate Smith's plea, arguing that she was entitled to withdraw from the plea agreement if the trial court would not approve it in its entirety. The court denied the prosecutor's motion, concluding that allowing the prosecutor to renegotiate the plea agreement would harm the interests of justice. The prosecutor appealed. The Court of Appeals, RIORDAN, P.J., and FORT HOOD and SERVITTO, JJ., initially dismissed the appeal as moot in an unpublished per curiam opinion issued April 18, 2017 (Docket No. 332288), because defendant had voluntarily resigned his seat and appeared to have no intention of running for public office during his term of probation. Shortly after this opinion was issued, defendant filed petitions to run for a seat on the Detroit City Council. In response, the prosecutor moved for reconsideration. After a majority of the Court of Appeals panel voted to deny the motion, the prosecutor appealed in the Supreme Court, which remanded the case to the Court of Appeals for consideration as on reconsideration granted. 501 Mich 851 (2017). On remand, the Court of

Appeals, SERVITTO and M. J. KELLY, JJ. (RIORDAN, P.J., dissenting), affirmed, holding that the resignation and bar-to-office provisions violated the constitutional separation of powers and that the plea agreement infringed the right of defendant's constituents to determine whether defendant was qualified to hold the office. The Court also held that the trial court had not abused its discretion by denying the prosecutor's motion to vacate the plea. The prosecutor appealed. The Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 852 (2017).

In an opinion by Justice VIVIANO, joined by Justices MCCORMACK and BERNSTEIN, and an opinion by Justice CLEMENT, the Supreme Court *held*:

The provision of the plea agreement that barred defendant from holding office was void as against public policy. The trial court abused its discretion by not permitting the prosecutor to withdraw from the plea agreement after determining that some of its provisions were void. The question regarding the validity of the resignation provision was moot and therefore was not reached. The part of the Court of Appeals judgment holding that the resignation provision in the plea agreement was invalid was vacated as moot.

Court of Appeals' judgment affirmed in part and reversed in part; case remanded to the trial court for further proceedings.

Justice VIVIANO held that the resignation provision in the plea deal was moot because, given that defendant's resignation had already taken effect and could not be retracted, any judgment on the matter would lack practical legal effect and the parties failed to show that the issue was likely to evade review, which justified vacating the part of the Court of Appeals judgment addressing that issue. Justice VIVIANO concluded that it was unnecessary to reach the question whether the bar-to-office provision of the plea agreement violated the constitutional separation of powers because the matter could be resolved on nonconstitutional grounds, specifically, that the provision was unenforceable as a matter of public policy. He also held that the trial court had erred by voiding terms of the plea deal without permitting the prosecutor to withdraw from the agreement under *People v Siebert*, 450 Mich 500 (1995), stating that when a court rejects either the sentence in a plea agreement or an agreement term like a bar-to-office provision, while keeping the rest of the agreement, the trial court essentially imposes a different plea bargain on the prosecutor than he or she agreed to, thereby infringing the prosecutor's charging discretion. Justice VIVIANO also expressed the view that

the test for determining whether the plea agreement violated public policy should be that set forth in *Town of Newton v Rumery*, 480 US 386 (1987), under which a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement, and he concluded that the bar-to-office provision in this case failed that test.

Justice CLEMENT, concurring in part and concurring in the judgment in part, agreed that the Court of Appeals' evaluation of the resignation provision should be vacated because the provision's validity was moot by the time the issue came before that Court and that the bar-to-office provision was invalid as a matter of public policy; however, she disagreed that the applicable test in this case was the one set forth in *Rumery*, which involved a release-dismissal agreement rather than a plea agreement. She would instead have relied on the common law of contracts to conclude that defendant was prohibited from bargaining away his ability to run for office in exchange for less-punitive criminal charges because agreements impairing elections are void as against public policy. Justice CLEMENT agreed that the trial court violated *Siebert* by not allowing the prosecutor to withdraw from the agreement in contravention of the separation of powers, and she therefore concurred in the remand for further proceedings consistent with the Court's judgment.

Chief Justice MARKMAN, joined by Justices ZAHRA and WILDER, concurring in part and dissenting in part, agreed that the Court of Appeals had erred by addressing the validity of the resignation obligation of the agreement because that issue was rendered moot by the fact that defendant had already resigned, and he further agreed with vacating that part of the Court of Appeals judgment. However, he disagreed that the bar-to-office obligation of the agreement was invalid, noting that defendant had entered into it voluntarily as an alternative to a criminal conviction that threatened as a practical matter to bar him from holding legislative office for longer than the provision in the plea agreement would have. He stated that the bar-to-office obligation did not violate the separation-of-powers principle because it did not add a qualification for office or infringe the power of a branch of government to determine the qualifications of its own members. He further stated that defendant had failed to show that the bar-to-office obligation was void as against public policy and that the preponderance of public policy actually weighed in favor of upholding that obligation. Chief Justice MARKMAN would have reversed the

Court of Appeals to the extent that it ruled that the bar-to-office obligation was invalid and remanded the case to the trial court for further proceedings.

1. CRIMINAL LAW — PLEA AGREEMENTS — PROVISIONS BARRING THE HOLDING OF PUBLIC OFFICE.

A provision in a plea agreement that bars a defendant from holding public office may be held void as against public policy.

2. CRIMINAL LAW — PLEA AGREEMENTS — UNILATERAL MODIFICATION BY COURT — PROSECUTOR'S RIGHT TO WITHDRAW.

A court may not render void a provision of a plea agreement that bars a defendant from holding public office without thereafter allowing the prosecutor an opportunity to withdraw from the plea agreement.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym Worthy*, Prosecuting Attorney, and *Jason W. Williams*, Chief of Research, Training, and Appeals, for the people.

State Appellate Defender (by *Valerie Newman*) for defendant.

Amici Curiae:

William J. Vailliencourt, Jr., for the Prosecuting Attorneys Association of Michigan.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *B. Eric Restuccia*, Deputy Solicitor General, for the Wayne County Prosecutor's Office.

VIVIANO, J. As part of defendant's plea deal, he agreed to resign his position as a state senator and not seek public office during his five-year probationary term. After reviewing the agreement, the trial court determined that these terms violated the separation-of-powers doctrine and public policy. It struck down the terms but, over the prosecutor's objection, enforced the

rest of the plea deal. The Court of Appeals affirmed. We took this case to decide whether the resignation and bar-to-office provisions of the plea deal were enforceable, and if not, whether the trial court erred by refusing to allow the prosecutor to withdraw from the deal. We hold that: (1) the question regarding the resignation provision is now moot and we therefore decline to reach it and instead vacate the Court of Appeals' discussion of that issue, (2) the bar-to-office provision is unenforceable as against public policy, and (3) the trial court erred by not permitting the prosecutor to withdraw from the plea agreement under *People v Siebert*.[1] We would have further held that the validity of the bar-to-office provision must be assessed under the balancing test in *Town of Newton v Rumery*.[2]

I. FACTS AND PROCEDURAL HISTORY

While serving as a state senator, in May 2015, defendant fired his rifle at his ex-wife's car and into the air in her presence. He was charged with felonious assault, MCL 750.82; domestic violence, MCL 750.81; malicious destruction of personal property (worth $20,000 or more), MCL 750.377a; and felony-firearm, MCL 750.227b. In February 2016 he entered into a plea agreement that required him to plead guilty to malicious destruction of property in exchange for dismissal of the other charges. The plea agreement included a sentence agreement to a sentence of 10 months in the Wayne County Jail and 5 years' probation. Defendant also had to comply with various other

[1] *People v Siebert*, 450 Mich 500; 537 NW2d 891 (1995).

[2] *Town of Newton v Rumery*, 480 US 386; 107 S Ct 1187; 94 L Ed 2d 405 (1987). Because the partial concurrence did not join this portion of the opinion, adoption of the *Rumery* test failed to garner majority support.

conditions, including the two at issue here: "Resign position as State Senator" (the resignation provision) and "Cannot hold elective or appointed office during full pendency of probation" (the bar-to-office provision).

The plea agreement was put on the record, and defendant pleaded guilty. At a sentencing hearing on March 14, 2016, the court sua sponte struck the resignation and bar-to-office provisions but otherwise sentenced defendant in accordance with the plea agreement. In an order, the trial court explained that the struck provisions represented "an unconstitutional interference by the Prosecutor with the legislative branch of government and with the rights of the defendant's constituents." Further, the order stated that the provisions "offend[] the Constitution of the State of Michigan, [are] contrary to public policy and compromise[] the integrity of this court." In all other respects, however, the trial court enforced the plea agreement.

The prosecution moved to vacate the plea, arguing that defendant had not yet resigned and thus had failed to comply with the plea agreement. The prosecutor further contended that because the court failed to enforce the entire original agreement, the prosecutor was entitled to withdraw from the plea. The trial judge rejected the prosecutor's motion, finding that vacation would not serve the interests of justice.

Defendant resigned his position as a state senator on April 12, 2016. In an opinion issued on April 18, 2017, the Court of Appeals dismissed the appeal as moot because Smith had voluntarily resigned and expressed no intention of running for office during his probation period.[3] The same day the Court of Appeals issued its opinion, defendant submitted petitions to

[3] *People v Smith*, unpublished per curiam opinion of the Court of Appeals, issued April 18, 2017 (Docket No. 332288).

run for Detroit City Council. He came in second place in the August 2017 primary, but he lost the general election in November.

Before the general election, the prosecutor sought leave to appeal in this Court, contending that the case represented an election-related emergency. We remanded to the Court of Appeals,[4] which affirmed the trial court in an opinion issued August 22, 2017.[5] The Court held that the resignation and bar-to-office provisions were unconstitutional violations of the separation-of-powers doctrine, because only the Legislature could expel its members.[6] Further, the plea agreement "invaded the right of defendant's constituents to 'decide upon his moral and other qualifications' when defendant's crimes did not specifically disqualify him" under pertinent constitutional provisions.[7] The Court also held that the trial court did not abuse its discretion by denying the prosecution's motion to vacate the plea because defendant had fulfilled many of the terms of the plea deal and therefore the prosecution should not be allowed a second opportunity to negotiate.[8] Judge RIORDAN dissented, finding no violation of the separation-of-powers doctrine and asserting that the trial court had abused its discretion by not allowing the prosecutor's withdrawal from the plea agreement.[9]

The prosecutor again appealed, and we ordered oral argument on whether to grant the application, directing the parties to brief:

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[4] *People v Smith*, 501 Mich 851 (2017).

[5] *People v Smith (On Remand)*, 321 Mich App 80; 922 NW2d 615 (2017).

[6] *Id*. at 92.

[7] *Id*.

[8] *Id*. at 97-98.

[9] *Id*. at 103-105 (RIORDAN, J., dissenting).

(1) whether a prosecutor's inclusion of a provision in a plea agreement that prohibits a defendant from holding public office violates the separation of powers, see Const 1963, art 3, § 2; see also *United States v Richmond*, 550 F Supp 605 (ED NY, 1982), or is void as against public policy, *Davies v Grossmont Union High Sch Dist*, 930 F2d 1390, 1392-1393 (CA 9, 1991); (2) whether the validity of the provision requiring the defendant to resign from public office was properly before the Court of Appeals since the defendant resigned from the Michigan Senate after the Wayne Circuit Court had struck that part of the plea agreement and, if so, whether it violates the separation of powers or is void as against public policy; and (3) whether the trial court abused its discretion by voiding terms of the plea agreement without affording the prosecutor an opportunity to withdraw from the agreement, see *People v Siebert*, 450 Mich 500, 504 (1995).[10]

II. STANDARD OF REVIEW

Questions of law are reviewed de novo.[11] Trial court decisions regarding motions to vacate pleas are reviewed for an abuse of discretion.[12]

III. ANALYSIS

A. THE RESIGNATION PROVISION

The first issue is whether the resignation provision in the plea deal is moot. "It is well established that a court will not decide moot issues."[13] A dispute is moot if no controversy exists and any judgment on the matter would lack practical legal effect.[14] Courts will not

[10] *People v Smith*, 501 Mich 852, 852-853 (2017).

[11] *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

[12] *People v Strong*, 213 Mich App 107, 111-112; 539 NW2d 736 (1995).

[13] *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010).

[14] *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018).

entertain such abstract issues unless they are "of public significance" and are "likely to recur, yet may evade judicial review."[15] Here, defendant's resignation has already taken effect and cannot be retracted. If we were to strike the provision, our decision on the issue would lack practical legal effect.

The parties have failed to show that this issue is likely to evade review. The trial court struck the resignation provision from the plea deal *before* defendant voluntarily decided to resign from office. If defendant had not resigned from office, then the Court of Appeals could have properly reviewed the validity of the resignation provision. Consequently, we hold that the issue is moot and we will not address it. In addition, we vacate as moot that part of the Court of Appeals' judgment holding the resignation provision to be invalid.

B. THE BAR-TO-OFFICE PROVISION

The second issue is whether the bar-to-office provision violates the separation-of-powers doctrine or is void as against public policy. Since we generally avoid constitutional decisions if nonconstitutional grounds can resolve a case,[16] we begin with public policy.

"Although the analogy may not hold in all respects, plea bargains are essentially contracts" and can be subject to the same rules and principles governing contracts.[17] One such rule is that contracts contravening public policy are void and unenforceable.[18] Public policy can be found "in our state and federal constitu-

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[15] *Richmond*, 486 Mich at 37.

[16] *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734; 664 NW2d 728 (2003).

[17] *Puckett v United States*, 556 US 129, 137; 129 S Ct 1423; 173 L Ed 2d 266 (2009).

[18] See *Mahoney v Lincoln Brick Co*, 304 Mich 694, 706; 8 NW2d 883 (1943).

tions, our statutes, and the common law," among other sources.[19] "Plea agreements are subject to the public policy constraints that bear upon the enforcement of other kinds of contracts."[20]

1. *RUMERY*'S BALANCING TEST

The United States Supreme Court has provided a framework for assessing whether certain agreements between prosecutors or government officials and criminal defendants violate public policy. In *Town of Newton v Rumery*, the Court explained the "well established" balancing test under which "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[21] That case involved a release-dismissal agreement whereby the prosecutor agreed to drop all charges against a criminal defendant in exchange for a waiver by the defendant of his right to pursue any statutory causes of action against the town or its officials.[22] The criminal defendant then instituted a civil suit alleging that the agreement violated public policy.[23] To determine whether that

[19] *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002). As the dissent is well aware, see *post* at 674, and despite its intermittent protestations to the contrary, see *post* at 683-686, under Michigan law, public policy may be grounded in the common law. See *Terrien*, 467 Mich at 66-67 ("In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the *common law*.") (emphasis added).

[20] *United States v Yemitan*, 70 F3d 746, 748 (CA 2, 1995).

[21] *Rumery*, 480 US at 392, citing Restatement Contracts, 2d, § 178(1).

[22] *Rumery*, 480 US at 390-391.

[23] *Id*. at 391.

agreement could stand, the Court held that the above balancing test applied; accordingly, the opinion examined whether the interests in enforcing the agreement were outweighed by public-policy concerns.[24]

Rumery's balancing test was applied to a bar-to-office provision in *Davies v Grossmont Union High Sch Dist*.[25] There, the plaintiff had previously settled a civil rights complaint against the defendants, including a school district, in part by agreeing not to run for the district's school board.[26] The plaintiff subsequently ran for and won a board position. The United States Court of Appeals for the Ninth Circuit examined whether the provision was unenforceable as a matter of public policy. The court treated the provision as a waiver of rights and looked to *Rumery*'s balancing test to resolve the case.[27] The court determined that the interests favoring nonenforcement, which included the electorate's right to vote, outweighed the interest in enforce-

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[24] A majority agreed with this approach, but Justice O'Connor concurred separately to explain that she would explicitly require defendants to prove that the agreement served public interests. She also discussed various factors to consider in the balancing test. *Id*. at 399, 401-402 (O'Connor, J., concurring). The Court also discussed the relationship between a release-dismissal agreement and a plea bargain, noting that they are not completely analogous. *Id*. at 393 & n 3 (opinion of the Court). Nonetheless, the Court relied on principles from the plea-bargain context, and subsequent courts have applied *Rumery* to plea bargains containing release-dismissal agreements. See, e.g., *Burke v Johnson*, 167 F3d 276, 285 (CA 6, 1999) (noting that "the release/dismissal agreement [was] . . . entered into as part of a plea agreement").

[25] *Davies v Grossmont Union High Sch Dist*, 930 F2d 1390 (CA 9, 1991).

[26] *Id*. at 1392. The plaintiff also received $39,200 for settling the suit, *id*., but that payment did not figure significantly in the court's analysis, constituting only an alternative rationale for rejecting one piece of the defendant's argument.

[27] *Id*. at 1396, citing *Rumery*, 480 US 386.

ment, which included the settlement of litigation and the protection of voters.[28]

We believe *Rumery* and *Davies* point the way forward in this case. It is true that we are not dealing with a release-dismissal agreement.[29] The prosecutor here has not cut a deal to shield a municipality or its officials from liability, and the bar-to-office provision is ostensibly for the public's good, not the prosecutor's private gain. But the interests at stake in the present case are materially similar to those in *Rumery* and *Davies*. Prosecutors have broad charging discretion.[30] For this reason, prosecutors are obliged to fulfill the functions of their office without regard to political considerations.[31] Giving prosecutors unfettered discretion to decide which defendants should be excluded

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[28] *Davies*, 930 F2d at 1397-1398.

[29] Our Court of Appeals has employed the *Rumery* analysis to release-dismissal agreements, noting that it is a "flexible" approach that "protects against . . . potential misconduct . . . while allowing for situations where release-dismissal agreements advance the public interest." *Stamps v City of Taylor*, 218 Mich App 626, 634; 554 NW2d 603 (1996).

[30] *People v Ford*, 417 Mich 66, 84; 331 NW2d 878 (1982).

[31] See, e.g., ABA Standards for Criminal Justice: Prosecutorial Investigations (3d ed), Standard 26-3.6 (directing prosecutors to "generally not make decisions related to a criminal investigation based upon their impact on the political process" and to make decisions that limit the political impact); *Attorney General Memorandum for All Department of Justice Employees Concerning Election Year Sensitivities* (Mar 9, 2012), p 1, available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-election-year-sensitivities.pdf> (accessed July 18, 2018) [https://perma.cc/WWV7-C27J] ("Simply put, politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges. Law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department's mission and with the Principles of Federal Prosecution.").

from office would allow political considerations to enter into the prosecutor's charging calculus.[32]

Regardless of the prosecutor's motivations, a plea bargain that prevents an individual from holding public office has the same effect as a release-dismissal agreement that bars an individual from office. In each case, the democratic process is affected in ways that may have nothing to do with the voters' assessment of, or ability to assess, a candidate's fitness for office. As such, we conclude that the *Rumery* framework should apply to bar-to-office provisions in plea bargains.[33]

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[32] Cf. *In re Christoff*, 690 NE2d 1135, 1136 (Ind, 1997) (concluding that the incumbent prosecutor and his chief deputy committed professional misconduct by "threatening to renew a long-dormant criminal investigation against a political candidate seeking the office occupied by [the] incumbent prosecutor . . . unless the candidate opted to forgo his bid to seek the office"). Here, there is no allegation that the prosecutor was motivated by anything other than her desire to protect the public. Nor is there any suggestion that other prosecutors in this state are misusing their charging authority in this fashion. Rather, our point is only that categorical acceptance of bar-to-office provisions opens the door to self-interested plea deals in the same way that the United States Supreme Court thought that automatically allowing release-dismissal agreements would potentially allow prosecutors to seek private gain. See *Rumery*, 480 US at 395; cf. *United States v Richmond*, 550 F Supp 605, 608-609 (EDNY, 1982) (noting that the prosecutor's ability to use even "a private hint of prosecution" represented an "intolerable" possibility of abuse).

[33] We apply *Rumery* in this case because of the similarities between bar-to-office provisions in release-dismissal agreements and in plea bargains. We do not intend to suggest, however, that *Rumery*'s balancing test should be used to assess plea agreements or probationary terms more broadly, without regard to the nature of the rights at stake. In this regard, it is worth noting that application of the balancing test in the context of pursuit of office is not novel. Federal courts have applied a similar test to determine whether a public employee could be disciplined at work for speeches made while the employee was pursuing public office—these courts ask whether the employee's interest in his or her campaign speech outweighs the interests of the public employer. See, e.g., *Murphy v Cockrell*, 505 F3d 446, 452 (CA 6, 2007) (applying balancing test), citing *Pickering v Bd of Ed*, 391 US 563, 574; 88 S Ct 1731; 20 L Ed 2d 811 (1968); *Newcomb v Brennan*, 558 F2d 825, 830 (CA 7, 1977) (same); *Magill v Lynch*, 560 F2d 22, 27 (CA 1, 1977) (same).

2. PUBLIC POLICIES FAVORING NONENFORCEMENT

This case, like *Davies*, "involves the most important political right in a democratic system of government: the right of the people to elect representatives of their own choosing to public office."[34] When the government limits voters' options, the constitutional rights to vote and associate are implicated.[35] As the United States Supreme Court has observed in a somewhat different context, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[36] The voters' rights are thus burdened by the exclusion of candidates from office.[37] Schemes that affect the "selection and eligibility of candidates . . . inevitably affect[]—at least to some degree—the individual's right to vote and his right to associate with others for political ends."[38] The practical effect of enforcing a bar on a willing individual's ability to run is "a limitation on the fundamental right to vote . . . ."[39] "[T]he source of the qualification" on eligibility for office "is of little moment in assessing the qualification's restrictive impact."[40]

These basic principles, and many related ones, permeate our law. To begin, our Constitution provides that

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[34] *Davies*, 930 F2d at 1397.

[35] *Id*. at 1396-1397; *Anderson v Celebrezze*, 460 US 780, 787-788; 103 S Ct 1564; 75 L Ed 2d 547 (1983).

[36] *Bullock v Carter*, 405 US 134, 143; 92 S Ct 849; 31 L Ed 2d 92 (1972).

[37] *Anderson*, 460 US at 787-788.

[38] *Id*. at 788.

[39] *Davies*, 930 F2d at 1398.

[40] *US Term Limits, Inc v Thornton*, 514 US 779, 820; 115 S Ct 1842; 131 L Ed 2d 881 (1995).

"[a]ll political power is inherent in the people."[41] "[T]he right to vote is an implicit 'fundamental political right' that is 'preservative of all rights.' "[42] The right can be regulated, but not impaired,[43] and neither the judiciary nor the Legislature can construct arbitrary exclusions from holding office.[44] In *Speed v Common Council of Detroit*, we noted that absent laws regulating eligibility for office, "[t]here is no restriction upon the power of the people to elect, or the appointing power to appoint, any citizen to office, notwithstanding his previous character, habits, or official misconduct."[45]

Moreover, we believe that public offices should not be treated like private property. As *Davies* observed, "To treat political rights as economic commodities corrupts the political process."[46] Such treatment fundamentally misunderstands the nature of public office: the law has long been clear that there is no property interest in holding public office.[47] As we have stated, "A public office cannot be called 'property,' within the meaning of" various constitutional provisions protecting property interests, including the Due Process

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[41] Const 1963, art 1, § 1.

[42] *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16; 740 NW2d 444 (2007), quoting *Reynolds v Sims*, 377 US 533, 562; 84 S Ct 1362; 12 L Ed 2d 506 (1964) (cleaned up).

[43] *Todd v Boards of Election Comm'rs*, 104 Mich 474, 482; 64 NW 496 (1895).

[44] *Attorney General ex rel Cook v O'Neill*, 280 Mich 649, 656; 274 NW 445 (1937); see also *Schweitzer v Plymouth City Clerk*, 381 Mich 485, 493-494; 164 NW2d 35 (1969) (explaining that the electorate can establish qualifications for office and that courts should not attempt "from the depths of their urbanity [to] impose upon the people . . . a 'purer' form of democracy than they choose for themselves").

[45] *Speed v Common Council of Detroit*, 98 Mich 360, 364; 57 NW 406 (1894).

[46] *Davies*, 930 F2d at 1398.

[47] See *Basket v Moss*, 115 NC 448, 457; 20 SE 733 (NC, 1894).

Clause.[48] Instead, "[p]ublic offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they are agencies for the State . . . ."[49] Thus, public offices cannot be commoditized for the personal benefit of the officeholder or aspiring officeholder.

To enforce these important public policies, courts have closely reviewed deals made by public officials or candidates for office. As we have noted, a contract made by a public officer has been held to be void as against public policy " 'if it interferes with the unbiased discharge of [the officer's] duty to the public . . . , or even if it has a tendency to induce him to violate such duty[.]' "[50] Our election laws broaden this policy by making it a misdemeanor to, among other things, "solicit any valuable consideration from a candidate for nomination for, or election to, an office described in this act."[51] The definition of "valuable consideration"—including, among other things, property, money, prizes, offices, and the like—is sweeping, preventing many types of promises that could be extracted from candidates for public office.[52] The statute thus displays the law's hostility to a broad range of deal-making with

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[48] *Attorney General v Jochim*, 99 Mich 358, 367-368; 58 NW 611 (1894).

[49] *Id*.; see also *Taylor v Beckham*, 178 US 548, 577; 20 S Ct 890; 44 L Ed 1187 (1900) ("The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such," and "the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right."); *Molinaro v Driver*, 364 Mich 341, 350; 111 NW2d 50 (1961) ("An office holder has no contract rights or vested rights to public office.").

[50] *Sellars v Lamb*, 303 Mich 604, 609; 6 NW2d 911 (1942) (citation omitted).

[51] MCL 168.931(1)(c).

[52] MCL 168.931(4) (" '[V]aluable consideration' includes, but is not limited to, money, property, a gift, a prize or chance for a prize, a fee, a loan, an office, a position, an appointment, or employment.").

regard to public office, even by mere candidates and even for noneconomic consideration.

In a similar vein, the common law has long held that agreements impairing elections are void as against public policy.[53] The reason for this rule was that "[p]ublic offices are public trusts, and should be conferred solely upon considerations of ability, integrity, fidelity and fitness for the position."[54] On this basis, agreements procuring a candidate's withdrawal from the pursuit of public office have been found void as against public policy.[55] That is, an agreement *not to run* for office is unenforceable. It is true that many of these cases involved the exchange of money for the candidate's withdrawal or involved candidates who had been officially nominated.[56] Nonetheless, they were also undergirded by concerns for the electoral process and voting

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[53] See Clark, Hand-book of the Law of Contracts (1894), § 185, p 428 ("Any agreement which tends to impair the integrity of public elections is clearly contrary to public policy."). This rule has been echoed numerous times by treatise writers through the present. See 7 Williston, Contracts (4th ed), § 16:8, p 439 ("[A] bargain between rival candidates that one would withdraw in consideration of a promise by the other to appoint the withdrawing party to office is illegal[.]"); 17A CJS, Contracts, § 290, p 153 ("Agreements which tend to impair the integrity of public elections are contrary to public policy."); McCrary, A Treatise on the American Law of Elections (4th ed), § 220, p 166 ("The principles of public policy, which forbid and make void all contracts tending to the corruption of elections, apply equally to what are called primary or nominating elections, or conventions, although these are mere voluntary proceedings of the voters of certain political parties."); Greenhood, The Doctrine of Public Policy in the Law of Contracts (1886), Rule CCCXXII, p 387 (noting that a contract that "is calculated to exercise an injurious influence over the purity of elections" is void); Fry, A Treatise on the Specific Performance of Contracts (1871), § 309, p *144 n 2 ("Contracts affecting public elections are held void[.]") (italics omitted).

[54] *Basket*, 115 NC at 457.

[55] *Ham v Smith*, 87 Pa 63, 66 (1878).

[56] See, e.g., *Martin v Francis*, 173 Ky 529, 533; 191 SW 259 (1917) (explaining that allowing such a bargain would be tantamount to

rights. As one court stated, such an agreement "is against public policy because it affects the integrity of the elective franchise and puts it in the power of a corrupt person to defeat the will of the people . . . ."[57]

Thus, various policies weigh in favor of nonenforcement, including the effect the agreement has on voters' rights and the potential for treating public office as private property.

3. PUBLIC POLICIES FAVORING ENFORCEMENT

Turning to the policies favoring enforcement, we begin by noting that prosecutors have broad charging discretion when pursuing their cases.[58] And "plea bargaining [is] 'an essential component of the administration of justice'."[59] Consequently, at a general level, public policy supports the plea-bargaining process.[60] But these interests are not without limits. A prosecutor has no interest in "enter[ing] into plea agreements at any expense" and regardless of whether the agreement serves the ends of justice.[61] Likewise, a prosecutor may not abuse his or her charging discretion by exercising it in an arbitrary manner.[62] The prosecutor here also notes that the "public expects lawmakers to uphold the laws, and it is appropriate to punish lawmakers, like other members of the public, when they do not." Additionally, the prosecutor and the dissent contend

"a fraud on the people who nominated" the candidate and preclude the political party's ability to even put forward a candidate).

[57] *Id*.

[58] See *Ford*, 417 Mich at 84.

[59] *People v Killebrew*, 416 Mich 189, 197; 330 NW 2d 834 (1982), quoting *Santobello v New York*, 404 US 257, 260; 92 S Ct 495; 30 L Ed 2d 427 (1971).

[60] See *People v Rodriguez*, 192 Mich App 1, 4-5; 480 NW2d 287 (1991).

[61] *Id*. at 6-7.

[62] See *Ford*, 417 Mich at 84.

that other defendants can surrender the practice of their professions, and candidates for office should also be able to relinquish their ability to pursue office.

4. APPLICATION

Weighing the interests in this case, we conclude that public policy favors nonenforcement of the bar-to-office provision. As in *Davies*, "the public interest at stake in this case is of the highest order," as it relates to the heart of the democratic process: voting.[63] By restricting the eligibility of defendant to run for office, the bar-to-office provision restricts the foundational right of voters to select their representatives. Further, we disagree with the prosecutor and the dissent that a candidate for office should be treated like any other professional who can, as a bargaining chip, offer to forgo the right to practice his or her profession. The public policies discussed above reject the notion that public office can be commoditized in this fashion for personal gain. Rather, public offices are public trusts. For this reason and the others detailed above, courts have long looked with skepticism on agreements that affect elections for a candidate's personal gain.

Against these specific and compelling policies, the prosecutor and the dissent offer only generalized interests in the enforcement of the plea agreement.[64] A

[63] *Davies*, 930 F2d at 1397.

[64] After citing our court rule permitting plea bargains, MCR 6.302(C)(1), and a few broad comments from the United States Supreme Court and this Court emphasizing positive aspects of the plea-bargaining process—with which we have no quarrel—the dissent discerns a "long-standing public policy in support of respecting freely and fairly reached plea agreements between the prosecutor and criminal defendants . . . ." *Post* at 676. However, ironically, the dissent cites no constitutional, statutory, or common-law authority for this proposition, upon which much of its analysis rests. See *Terrien*, 467 Mich at 66-67. And the court rule the dissent cites merely recognizes that plea bargains are permitted, not that they are favored or should always be enforced.

prosecutor's charging discretion is a background principle that does not entitle a prosecutor to impair elections. Nor does the right to enter plea bargains—or the related need for efficient resolution of criminal prosecutions—justify this bar-to-office provision. In every case, the prosecutor wields charging discretion and can enter plea agreements with the court's approval; to say that tells us nothing about whether the prosecutor should be able to enforce a bar-to-office term in this case. Similarly, the need to punish defendant does not mandate this particular form of punishment, which also impairs the rights of voters by limiting their options. These rationales offered by the prosecutor do not justify the imposition that the bar-to-office provision places on the democratic process.

Another important consideration in our analysis is whether a logical connection exists between the charged crimes and the bar-to-office provision. *Davies*, after weighing the interests at stake, inquired whether the government had a "legitimate reason" for the waiver of the plaintiff's right to run for office.[65] According to *Davies*, a "legitimate reason will almost always include a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived."[66] Put differently, "[t]he absence of a close nexus will ordinarily show that the government is seeking the waiver of important rights without a legitimate governmental interest that justifies doing so."[67]

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[65] *Davies*, 930 F2d at 1399.

[66] *Id*.

[67] *Id*.

In this regard, comparison to our state's laws on eligibility for office is instructive, as they too suggest the need for a nexus. The types of crimes that bar an individual from office typically relate to public office. For example, Const 1963, art 4, § 7 provides that "[n]o person who has been convicted of subversion or who has within the preceding 20 years been convicted of a felony involving a breach of public trust shall be eligible for either house of the legislature." More broadly, Const 1963, art 11, § 8 renders individuals ineligible for office if "within the immediately preceding 20 years" they have been convicted of certain crimes involving dishonesty and the convictions were "related to the person's official capacity while the person was holding any elective office . . . ."[68] Thus, the law does not exclude every person convicted of a crime from public office—instead, it allows the voters to determine whether commission of crimes unrelated to public office renders a person unfit for public service.

Here, no "close nexus" exists between the charged offenses and defendant's conduct in office. However egregious defendant's alleged offenses may be, they do not directly relate to the duties and responsibilities of public office—he was not charged with misconduct that was in any manner related to public office. Consequently, the prosecutor can point to no legitimate

[68] Relevant statutes display the same emphasis on misconduct related to public office. MCL 750.118 provides that an officer of any of the three branches of government who accepts a bribe or offers to make gifts in exchange for official action shall "be forever disqualified to hold any public office" in this state. Even when the subject of the statute is not a public official, statutory bar-to-office laws can involve public office. For example, if a person violates the $2 million limitation on "candidate committee" expenditures, he or she can be punished by being "prohibit[ed] . . . from assuming the duties of a public office . . . ." MCL 169.267(4).

reason for the bar-to-office provision.[69] Its inclusion in the plea agreement reflects, instead, the prosecutor's own conclusion that defendant should not serve in public office.[70] Our laws do not give prosecutors the unilateral authority to make this determination.

For these reasons, we agree with both lower courts that the bar-to-office provision in defendant's plea agreement is void as against public policy.[71]

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[69] Compare the prosecutor's argument here with *City of Baldwin v Barrett*, 265 Ga 489; 458 SE2d 619 (1995), in which the Georgia Supreme Court upheld a bar-to-office provision in a plea deal with a mayor who pleaded guilty to theft and forgery while in office. The Court noted that the prosecutor's interest in the provision was "safeguard[ing] the public interest by preventing [the defendant] from holding a position where he may repeat the misconduct." *Id.* at 490. No similar interest is alleged here, nor would keeping defendant out of office prevent him from repeating the offenses he was charged with. Using a rationale similar to the one suggested in *Barrett*, the United States Department of Justice only permits federal prosecutors to seek bar-to-office provisions in plea agreements "with public officials who are charged with federal offenses that focus on abuse of the office(s) involved." United States Department of Justice, *US Attorneys' Manual*, § 9-16.110, available at <https://www.justice.gov/usam/usam-9-16000-pleas-federal-rule-criminal-procedure-11#9-16.110> (accessed July 18, 2018) [http://perma.cc/YN43-LS4H].

[70] The prosecutor sought an expedited ruling in this case before the November 2017 election, contending that the voters needed to be informed "whether defendant will be violating the plea agreement if elected and that a special election would be necessary in the event defendant resigns or is removed from office." Thus, it appears that the prosecutor was trying to influence the outcome of the election—at least to the extent of attempting to have defendant removed from the ballot or by providing information that would persuade voters not to vote for him. We, of course, offer no opinion on defendant's suitability for office. But we do note that "[d]emocracy does not, after all, guarantee good government or even the election of well qualified individuals." *Davies*, 930 F2d at 1398. Rather, representative government "is premised on the proposition that the people are the best judges of their own interests, and that in the long run it is better to permit them to make their own mistakes than to permit their 'rulers' to make all their decisions for them." *Id.*

[71] As a result, we do not reach the issue whether the provision violates the separation-of-powers doctrine.

C. PLEA WITHDRAWAL

The final issue in this case is whether the trial court erred by voiding terms of the plea deal without permitting the prosecutor to withdraw from the agreement. This question need not detain us long. In *People v Siebert*, we considered "whether a prosecutor may withdraw from a plea bargain that includes a sentence agreement when the court intends to impose a sentence lower than the agreement calls for."[72] We held that "a prosecutor . . . is entitled to learn that the judge does not intend to impose the agreed-upon sentence . . . and [be] given an opportunity to withdraw from the plea agreement."[73] This conclusion stemmed, in part, from the prosecution's constitutional interest in being entrusted with the authority to charge defendants.[74] If a court could "maintain its acceptance of the plea over the prosecutor's objection, it would effectively assume the prosecutor's constitutional authority to determine the charge or charges a defendant will face."[75]

In the present case, the trial court did not reject the sentencing provision of the plea agreement, but that fact makes no difference. *Siebert* instructs that the trial court cannot assume the prosecutor's charging authority by accepting a plea bargain but rejecting its

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[72] *People v Siebert*, 450 Mich 500, 504; 537 NW2d 891 (1995) (opinion by BOYLE, J.).

[73] *Id*. at 510.

[74] *Id*., citing *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 684; 194 NW2d 693 (1972) (noting that because the determination of charges is an executive act, "[f]or the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers. . . . It also violates our fundamental sense of fair play").

[75] *Siebert*, 450 Mich at 510 (opinion by BOYLE, J.).

sentencing agreement. In the same way, the trial court cannot seek to enforce a plea bargain except for a bar-to-office provision. When it rejects either the sentence or a plea term like a bar-to-office provision, while keeping the rest of the agreement, the trial court essentially imposes a different plea bargain on the prosecutor than he or she agreed to. In such circumstances, the trial court infringes on the prosecutor's charging discretion. This is impermissible. If the trial court wishes to reject a bar-to-office provision, it must give the prosecutor an opportunity to withdraw from the agreement.

The trial court here did not provide such an opportunity and in fact denied the prosecutor's motion to vacate the plea. The Court of Appeals upheld this decision on the basis that allowing the prosecutor to withdraw would subvert the ends of justice. But neither the Court nor defendant has cited any authority for the proposition that a trial court may unilaterally modify the terms of a plea bargain in order to serve the court's notions of justice.[76] Therefore, we hold that the trial court abused its discretion by refusing to allow the prosecutor to withdraw from the plea agreement.

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[76] The Court of Appeals here quoted *People v Swirles (After Remand)*, 218 Mich App 133, 135; 553 NW2d 357 (1996), for the rule that " 'contractual theories will not be applied if to do so would subvert the ends of justice.' " *Smith (On Remand)*, 321 Mich App at 96. This statement does not suggest that courts have some inherent power to redraft plea agreements simply because those agreements are not based solely on contractual theories. The Court of Appeals also quoted *People v Jackson*, 192 Mich App 10, 15; 480 NW2d 283 (1991), for the proposition that plea bargains " 'must be reviewed within the context of their function to serve the administration of criminal justice.' " *Smith (On Remand)*, 321 Mich App at 96. But it is one thing to review a plea deal in that context and another to refashion a plea deal to further what the court may think is the goal of criminal justice in a given case.

IV. CONCLUSION

In this case, we hold that the bar-to-office provision in defendant's plea agreement is void. We would further hold that when challenged as void against public policy, bar-to-office provisions in plea agreements should be analyzed under the balancing test in *Rumery*. In the present case, the bar-to-office provision would not survive that test, as the conduct defendant is charged with bears no nexus with his public office. Further, we hold that the trial court erred by voiding the bar-to-office provision but refusing to permit the prosecutor to then withdraw from the plea agreement. Finally, we do not decide whether the resignation provision of the plea agreement is void as against public policy because that question is moot. We thus reverse the Court of Appeals' judgment in part, affirm in part, vacate as moot that part of the Court of Appeals' judgment holding that the resignation provision in the plea agreement was invalid, and remand the case to the trial court for further proceedings consistent with this opinion.

MCCORMACK and BERNSTEIN, JJ., concurred with VIVIANO, J.

CLEMENT, J. (*concurring in part and concurring in the judgment in part*). I concur in full with the Court's unanimous conclusion that the Court of Appeals' evaluation of the resignation provision should be vacated because the provision's validity was moot by the time the issue came before that Court. As explained below, however, I concur only in the judgment as to the lead opinion's analysis of the bar-to-office provision's invalidity.[1] Given our shared conclusion that the bar-to-office

[1] I also agree with the dissent's conclusion that the bar-to-office provision is not properly analyzed as a violation of the separation of

provision is invalid, I concur in full with the Court's conclusion that the trial court violated the separation of powers, *People v Siebert*, 450 Mich 500; 537 NW2d 891 (1995), and that this matter must therefore be remanded to the trial court to give the prosecutor an opportunity to withdraw from the plea agreement.

The lead opinion invalidates the bar-to-office provision of the plea agreement at issue on the basis of the balancing test established in *Town of Newton v Rumery*, 480 US 386; 107 S Ct 1187; 94 L Ed 2d 405 (1987), rev'g 778 F2d 66 (CA 1, 1985), which was applied to facts somewhat like the ones here in *Davies v Grossmont Union High Sch Dist*, 930 F2d 1390 (CA 9, 1991). But as the lead opinion notes, *Rumery* and *Davies* involved release-dismissal agreements, which are different from the instant plea bargain. In *Rumery*, the prosecutor agreed to dismiss certain charges against a criminal defendant in exchange for the defendant's releasing any claims under 42 USC 1983 he may have had against the municipality stemming from the prosecution. When the criminal defendant filed his § 1983 action anyway, the town raised the release-dismissal agreement as a defense. The United States Court of Appeals for the First Circuit held that such agreements were per se invalid, and the Supreme Court of the United States reversed, instead developing a balancing test to guide the determination of when such agreements could be upheld and concluding that the agreement in *Rumery* was valid. In *Davies*, a § 1983 plaintiff's settlement with the defendant school district included an agreement not to run for a seat on the district's board; the United States Court of Appeals for the Ninth Circuit applied the *Rumery* test and invalidated this provision when the plaintiff later ran for and won a seat on the board.

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powers, although this is not ultimately outcome-determinative given that I conclude the agreement here was void for other reasons.

I have no specific objection to the *Rumery* balancing test, but I do not believe it is necessary to decide this case. I believe this case can be more straightforwardly resolved on the basis that the common law of contracts[2] prohibits defendant from bargaining away his ability to run for office for something of value to him: less-punitive criminal charges. As the lead opinion notes, the common law has long held that agreements impairing elections are void as against public policy. I believe this principle, in and of itself, is a complete basis for holding that the plea agreement at issue here was void—defendant could not bargain away his ability to run for public office in exchange for charging considerations and expect to have a court endorse such an exchange.[3] The lead opinion cites several learned treatises, which I believe accu-

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[2] I agree with the Court's unanimous conclusion that plea agreements, while not exactly the same as contracts, are appropriately analogized to contracts for these purposes.

[3] *Rumery* itself said that it was founded on "traditional common-law principles." *Rumery*, 480 US at 392. As one commentator has noted:

> It is debatable, however, whether the *Rumery* majority identified the appropriate "well-established" common law principle. The common law fairly bristles with other appropriate starting points for analysis, most of which would point to the per se voidability of release-dismissal bargains. Contracts induced by threats of prosecution are voidable at common law, and duress by imprisonment can prevent the enforcement of releases. At common law, obtaining items of value under color of public office constituted the crime of extortion, and the common law offense of "compounding a crime" punished agreements not to prosecute a crime in exchange for payment. It should be no surprise, therefore, that before *Rumery*, the weight of state and federal precedent had prohibited such agreements. [Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U Pa L Rev 851, 861-862 (1988).]

Rumery cited 2 Restatement Contracts, 2d, § 178(1), p 6, as evidence of its "traditional common-law principles," although even the Restatement acknowledges that "a decision as to enforceability is reached only after a

rately set out the state of the law on this account.[4] Indeed, it long has been the case that a contract's consideration "must be a thing lawful in itself, or else the contract is void." 2 Blackstone, Commentaries on the Laws of England, p *444. Blackstone also remarked that "it is essential to the very being of Parliament that elections should be absolutely free, therefore all undue influences upon the electors are illegal, and strongly prohibited[.]" 1 Blackstone, Commentaries on the Laws of England, p *178. Particularly condemned were efforts by public officials to manipulate their offices for private gain:

> [T]he greatest danger is that in which [the legislators] co-operate, by the infamous practice of bribery and corruption. . . . [N]o candidate shall . . . give any money or entertainment to his electors, or promise to give any, either to

careful balancing" "[i]n doubtful cases," while "[i]n some cases the contravention of public policy is so grave . . . that unenforceability is plain." *Id*. at § 178, comment *b*. I have no objection to a balancing test as such, but I believe our common-law traditions demonstrate that this is not a "doubtful case."

[4] The dissent alleges that "[t]his is an entirely judicially manufactured 'public policy,' " but the rule against contracts impairing elections or public office is no more "judicially manufactured" than other common-law rules, such as the elements of negligence or contract formation. It is a well-established aspect of our common law of contracts, as documented by these treatises and the caselaw discussed in this opinion. Of course, the Legislature is free to change this statutorily. The dissent notes that MCL 750.118 says that a public official who accepts a bribe is "forever disqualified to hold any public office[.]" I do not question the Legislature's authority to impose a bar to holding office as a punishment for an offense, but I believe it is properly confined to situations in which the Legislature has specifically authorized it as a punishment for a particular crime. That the Legislature has authorized it for some crimes does not, in my judgment, reflect a public policy that it is available as a punishment for *any* offense a defendant might commit, especially in the face of our longstanding common-law rule against judicial enforcement of agreements that impair elections or public office. That said, I do not question the Legislature's ability to specifically authorize by statute the sort of negotiation that occurred in this case.

> particular persons, or to the place in general, in order to his being elected . . . . [*Id*. at *179.]

See also 8 Holdsworth, *A History of English Law* (1925), p 55 (noting that "tolerance of traffic in offices of trust" was "unintelligible" to the law).

It is, of course, true that few cases deal with this *exact* set of facts.[5] But I believe Michigan jurisprudence has not hesitated in the past to extend the concept of invalidating contracts that impinge upon elections and public office to new factual scenarios. For example, in *Harris v Chamberlain*, 126 Mich 280, 282-283; 85 NW 728 (1901), the parties agreed "that $200 should be paid at all events as soon as [the plaintiff] should cause the defendant to be appointed postmaster," an agreement which "was illegal and made the contract wholly void."[6] In support we cited *Snyder v Willey*, 33 Mich

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[5] The case with the most similar facts is arguably *United States v Richmond*, 550 F Supp 605 (EDNY, 1982). In that case, the defendant, a member of Congress, entered into a plea agreement requiring him to resign from Congress and withdraw as a candidate for reelection. The court purported to "void" those terms because they "conflicted with the fundamental right of the people to elect their representatives," "interfered with the principle of separation of powers," and allowed for "Executive domination of members of Congress through the threat of forced resignations." *Id*. at 606. In my view, *Richmond* erred by focusing on a nebulous right of the people to elect their representatives and consequences on interbranch relations, rather than approaching this as a matter of what sort of bargain *the defendant could make* with his office.

[6] See also *Benson v Bawden*, 149 Mich 584; 113 NW 20 (1907). In that case, the plaintiff was a Bessemer shopkeeper who wanted a post office located next to his store. He purchased the local post office's furniture and fixtures from the retiring postmaster and offered to sell them to the newly appointed postmaster for $1 if he would relocate the office next to the plaintiff's store. The new postmaster agreed to the move, which was subject to certain provisions allowing the plaintiff to reclaim the property in the future. When the plaintiff sought to exercise this power, the trial court allowed it. Although we ultimately affirmed the judgment on the ground that the parties were "equally in the wrong," *id*. at 588, we expressed our view of the "illegal agreement" in no uncertain terms,

483, 493-494 (1876), in which we held that it was a valid defense to a promissory note "that part of the consideration of the note was the suppression of the criminal prosecutions against" the note's issuer. Though *Snyder* was not precisely the same as *Harris*, *Harris* reasonably drew upon and extended *Snyder*.

I also do not believe it matters whether the prosecutor was seeking personal advantage in this case.[7] Our precedents focus on prohibiting the *risk* of wrongful conduct rather than invalidating only those agreements relating to public officers that *actually* are the product of corruption. For example, in *People ex rel Plugger v Overyssel Twp Bd*, 11 Mich 222 (1863), several townships along Lake Michigan voted to borrow money to improve harborage along the lakeshore, with each appointing "freeholders" to decide how to spend the money. The combined group of "freeholders" from the several townships awarded a contract to contractors who were themselves "freeholders" and members of the board. When some townships refused to pay, the contractors sued, but we invalidated the agreement even though there was no indication that the contract awarded was for anything other than the low bid and there were enough votes in favor of the contractors awarded the bid to give it to them even if the member-contractors had abstained from participating in the vote. We elaborated:

> Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is

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stating that the postmaster "should be disinterested" in "exercis[ing] his official judgment" and that the notion that an official could be "hired to act in the interest of any individual" was "shocking to a decent sense of propriety." *Id*. at 587.

[7] To be clear, I agree with the Court's unanimous conclusion that in this case, there is no reason to think the prosecutor was acting out of self-interested motivations.

> what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal. [*Id*. at 225-226 (opinion by MANNING, J.).]
>
> The fact that those contractors did not constitute a majority . . . , I do not regard as in any respect altering the principle, nor the fact that the contract was let to the lowest bidder. The price alone is but one element embraced in the question, and even this might be affected by their influence, by fixing time and place of the letting, by their right to decide upon the responsibility of the bidders, and by many other circumstances, over which, as members of the board, they might exercise an influence. . . . [I]t is manifestly impossible, from the nature of the case, to ascertain and measure the amount of their influence upon the board . . . .
>
> And though these contractors may, as members of the board, have acted honestly, and solely with reference to the public interest, yet, if they have acted otherwise, they occupy a position which puts it in their power to conceal the evidence of the facts, and to defy detection. [*Id*. at 227-228 (opinion by CHRISTIANCY, J.).][8]

Consequently, I am unpersuaded by the dissent's concern that this "would undermine the effective prosecution and punishment of public corruption." This sort of practical concern seems much the same as the *Plugger* dissent's observation that "[w]orks of enterprise" "in small and new townships" "cannot usually find many bidders," meaning that "forbidding such contracts [as were at issue] would be equivalent to shutting the best men out from office." *Id*. at 231

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[8] It may be the case that a *Plugger*-type case today would be more amenable to an analysis under Restatement § 178 (given that it did not involve running for public office, but rather public contracting), but it is evidence that this Court has historically not been shy about invalidating contracts involving potential public corruption.

(opinion by CAMPBELL, J.). I am as unmoved as the *Plugger* majority was. Much of our law undermines effective prosecution in one way or another in furtherance of other goods; prophylactically reducing the *risk* of political figures trading their status for some measure of impunity from the complete consequences of their criminal acts is one such good, just as reducing the *risk* of manipulating the bidding process justified invalidating the contract in *Plugger* even when it could not be shown that the contract was anything other than the low bid and the best deal for the public fisc. I also do not believe it matters whether this agreement came, as the dissent states, "in the course of an arm's-length criminal plea proceeding . . . overseen by a judicial tribunal." I believe that "the plea bargain cannot be allowed to supersede" the common law's determination that contracts impairing elections and public office are void as against public policy, even where both parties agree to it and a court has approved it. *People v Keefe*, 498 Mich 962, 965 (2015) (MARKMAN, J., concurring). Whether the source of the rule is the Legislature (as in *Keefe*) or the common law, I believe it must be abided by without regard to whether a court has approved it or a party prefers it.

When courts in other jurisdictions have confronted agreements tending to interfere with who holds public office, they have invalidated them. While no two cases are exactly alike, the common thread is judicial unwillingness to assist public officials in leveraging their offices for private benefit. Thus, in *Ham v Smith*, 87 Pa 63 (1878), the court refused to enforce a contract to pay a candidate to withdraw from a race so his opponent could be substituted on the party's ticket. In *Martin v Francis*, 173 Ky 529; 191 SW 259 (1917), a candidate for office gave his opponent a promissory note in exchange for his opponent not running and being

appointed the victor's deputy instead. The note "was immoral, illegal and against public policy" because it "affect[ed] the integrity of the elective franchise," *id*. at 533, and the promise to appoint, made "without reference to his fitness or qualifications for the place, . . . was part of an agreement entered into not for the benefit of the public but pursuant to a corrupt bargain detrimental to the public," *id*. at 534. In *Basket v Moss*, 115 NC 448; 20 SE 733 (1894), the defendant was a local postmaster who advised the plaintiff that he would leave his office and see to it that the plaintiff was appointed as his successor if the plaintiff would execute a promissory note to the defendant. When it came time to enforce the agreement, the court said:

> Public offices are public trusts, and should be conferred solely upon considerations of ability, integrity, fidelity and fitness for the position. Agreements for compensation to procure these tend directly and necessarily to lower the character of the appointments to the great detriment of the public. Hence such agreements, of whatever nature, have always been held void as being against public policy. . . . [T]he moral sense revolts at traffic to any extent in the bestowal of public office. It is against good morals as well as against the soundest principles of public policy. If public offices can be sold or procured for money, the purchasers will be sure to reimburse themselves by dispensing the functions of their offices for pecuniary consideration. [*Id*. at 457-458.]

I also do not see the caselaw as standing for the proposition that an *economic* exchange is the sine qua non of impropriety. For example, in *Buck v First Nat'l Bank of Paw Paw*, 27 Mich 293 (1873), Buck robbed a bank, and his relatives gave promissory notes to the bank to pay off what he robbed from the bank on the understanding that if his debt was paid off, the bank would use its influence to see to it that he was not

prosecuted. When he was prosecuted anyway, his relatives refused to pay. We noted that "[t]he theory of criminal punishment is that it should be graduated to the heinousness of the crime . . . ." *Id*. at 298. "Other considerations are not admissible, and whatever tends . . . to cause the penalty to be imposed on other grounds, may be said to be opposed to public policy." *Id*. I take from this that while what was involved happened to be a pecuniary exchange, that was not essential to our reasoning. Instead, what was essential was that a court was being asked to enforce an agreement that related to inducing public officials to act on the basis of something other than what they thought was in the public interest. I agree that "[t]he standards of commerce do not govern, and should not govern, the administration of criminal justice," *People v Reagan*, 395 Mich 306, 314; 235 NW2d 581 (1975), but I see no principled reason to conclude that defendant would be barred from escaping the full consequences of his conduct in exchange for *money*, but can do so in exchange for his *political future*.

I agree with the lead opinion (and *Rumery*) that the common law is the touchstone for our disposition of this case. However, I do not believe that either Blackstone or our predecessors in this Court would have tolerated the arrangement before us if asked, and I do believe that there is ample authority from common-law jurisdictions invalidating agreements of this sort. Therefore, it seems unnecessary to me to apply *Rumery* and *Davies* to the instant case and extend "the modern tendency to make the balance the measure of all things," *Releases, Redress, and Police Misconduct*, 136 U Pa L Rev at 862, when we can draw upon existing authority to invalidate this agreement per se under the law of contracts. In reaching this conclusion, I am mindful of the risk of "public policy" becoming nothing

more than "the personal preferences of a majority of this Court," because I agree that "such a policy must ultimately be clearly rooted in the law." *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002). But "the boundaries of public policy . . . are reflected in our state and federal constitutions, our statutes, and the common law." *Id*. at 66-67. This decision will not allow judges "to substitute their own personal preferences for those of the public expressed through the regular processes of the law," *id*. at 68 n 13, because it is grounded in a longstanding common-law tradition.

For these reasons, I concur in the Court's judgment that the bar-to-office provision at issue was invalid, meaning that the trial court correctly invalidated this provision of the plea agreement, albeit for the wrong reasons. However, as noted, I concur in full that the trial court violated *Siebert* in not allowing the prosecutor to withdraw from the agreement in contravention of the separation of powers,[9] and I therefore concur in the remand for further proceedings consistent with the Court's judgment.

MARKMAN, C.J. (*concurring in part and dissenting in part*). This case concerns the validity of a plea agree-

[9] The dissent invites me to "consider the corollary to" "the common-law rule against the sale of office by contract," which it characterizes as courts being unwilling to "restore the parties to their original position," citing *Snyder*, 33 Mich at 497. But in *Snyder*, the Court refused to "compel execution of a contrivance to violate the law." *Id*. at 496. Here, by contrast, the trial court has already violated the law by imposing a plea agreement on the prosecutor in violation of the separation of powers. I do not concur with the *Siebert* remand in order to restore any party to its original position, but rather to cure the trial court's violation of the separation of powers. While that happens to restore the prosecutor to her original position, this Court cannot tolerate the trial court's overstepping its bounds and, in violation of *Siebert*, exercising an executive function by imposing a plea deal on the prosecutor, regardless of the resulting consequences of unwinding that violation of the separation of powers.

ment voluntarily entered into by defendant that imposed upon him the obligation to resign from the state senate and to refrain from holding any elective or appointed office for the five-year duration of his probation. The trial court ruled that those two obligations were invalid and denied the prosecutor's subsequent motion to vacate the agreement. After defendant resigned from the Legislature, the Court of Appeals affirmed. I agree with the lead opinion that the Court of Appeals erred by addressing the validity of the resignation obligation of the agreement because that issue was rendered moot by the fact that defendant had already resigned, and I further agree with the decision to vacate that part of the Court of Appeals judgment. Hence, I concur with that part of the lead opinion. However, for the reasons set forth below, I respectfully disagree with the lead opinion and the concurrence that the Court of Appeals correctly held that the "bar to office" obligation of the agreement was invalid. Hence, I dissent from that part of the lead opinion.

I. FACTS AND HISTORY

In May 2015, defendant Virgil Smith, then a Michigan state senator, was involved in an altercation with his ex-wife during which he apparently fired a gun at her, at her car, and into the air in her vicinity. As a result, the prosecutor charged him with domestic violence, MCL 750.81(2); malicious destruction of personal property valued at $20,000 or more, MCL 750.377a(1)(a)(*i*); felonious assault, MCL 750.82; and possession of a firearm during the commission of a felony, MCL 750.227b. On February 11, 2016, the prosecutor and defendant entered into a plea agreement whereby defendant would plead guilty to mali-

cious destruction of personal property valued at $20,000 or more, serve a 10-month jail sentence, and be placed on probation for five years. In addition, the agreement provided that defendant must "[r]esign position as State Senator" and "[c]annot hold elective or appointed office during full pendency of probation."[1] Defendant agreed that these constituted his obligations under the plea agreement and supplied a factual basis for his guilty plea in court. The trial court accepted the plea and set a sentencing date for March 14, 2016.

At sentencing, the trial court ruled sua sponte that the obligations of the plea agreement requiring defendant to resign from the Legislature and to refrain from public office during his probation were invalid, explaining in relevant part:

> So it would be illegal for me to impose as a condition of sentence that he resign from office and that he not hold public office during the pendency of this probation. It would violate the separation of powers [be]cause I'm a member of the judicial branch and the constitution provides for the removal, a way that legislators can be removed.
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> * * *
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> This agreement here in this case subverts both the authority of the senate and that of the Defendant's constituents. It's against public policy, as I indicated, by using a technique that has the possibly [sic] of executive or prosecutorial domination of members of the state [legislature] through forced resignation . . . .

The court then inquired of the attorneys if either would

[1] Defendant was also required to comply with plea obligations that are not in dispute, including attendance at alcohol- and drug-treatment programs.

request to set aside the plea, and the prosecutor responded that she "would have to consult." The court then implied that it would likely deny such a motion, asserting that "it would not be in the interest of justice for me to allow this plea to be withdrawn if the prosecutor were to make that motion." Later that same day, the court entered an order voiding the "portions of the plea agreement that required the defendant to '[r]esign [his] position as State Senator' and '[not] hold elective or appointed office during the full pendency of probation' . . . ."

The prosecutor then moved to vacate the plea, asserting at the March 28, 2016 motion hearing that "our position is if the Court could not go along with it then you should allow us the opportunity to withdraw the plea because that is not what we bargained for." The court denied the motion, stating:

> [G]ranting the prosecution's motion to vacate this plea would compromise the Court's integrity by involving it in an act that violates public policy and offends the constitution. It does not matter that the Defendant voluntarily agreed to this portion of the plea agreement because these constitutional protections exist[] not for the Defendant's personal benefit, but to protect the rights of the Defendant's constituents and the right of the legislative branch of government.

The court entered a written order denying the prosecutor's motion that same day.

On April 1, 2016, the prosecutor sought leave to appeal in the Court of Appeals, arguing that the trial court erred by voiding the obligations of the plea agreement and abused its discretion by denying the prosecutor's motion to vacate the plea. At about the same time, defendant resigned from the state senate effective April 12, 2016. The Court of Appeals granted

leave on August 26, 2016, but on April 18, 2017, it dismissed the appeal as moot. *People v Smith*, unpublished per curiam opinion of the Court of Appeals, issued April 18, 2017 (Docket No. 332288). The Court of Appeals stated that "[b]ecause defendant voluntarily resigned his seat and appears to have no intention of running for public office during his term of probation, we decline to address the issues regarding the voiding of the plea agreement as moot." *Id*. at 2. Concerning the motion to vacate the plea, the Court of Appeals explained that "[w]hile we agree that it was an abuse of discretion by the trial court to deny the prosecution's motion to vacate the plea as soon as the trial court expressed its unwillingness to accept the terms of the agreement, granting such relief after the majority of the terms of the agreement have been fulfilled would be fundamentally unfair." *Id*. at 3. Within hours of the Court of Appeals' dismissal of the appeal as moot, defendant filed petitions for a seat on the Detroit City Council. On April 26, 2017, the prosecutor moved for reconsideration, observing that "[i]t is now beyond question that defendant intends to run for public office during the term of his probation."[2] Nonetheless, the Court of Appeals panel denied the motion for reconsideration.[3]

On July 26, 2017, the prosecutor sought leave to appeal in this Court, and on August 15, 2017, we

[2] Defendant received the second-highest number of votes in the August 2017 primary election for Detroit City Council, District 2, thus proceeding to the November 2017 general election where he lost to Roy McCalister, Jr.

[3] Judge RIORDAN, the dissenting Court of Appeals judge, would have granted the motion, agreeing with the prosecutor that "resignation, withdrawal, or forbearance from holding a public office may be part of a plea agreement." *People v Smith*, unpublished order of the Court of Appeals, entered June 2, 2017 (Docket No. 332288), p 2.

remanded to the Court of Appeals as on reconsideration granted. *People v Smith*, 501 Mich 851 (2017). Furthermore, we directed the Court of Appeals to issue an opinion no later than 5:00 p.m. on Friday, August 25, 2017, and ordered that any appeal from that decision must be filed no later than 5:00 p.m. on the following Monday.

On August 22, 2017, the Court of Appeals issued its opinion affirming the trial court in all respects. *People v Smith (On Remand)*, 321 Mich App 80; 922 NW2d 615 (2017). With regard to the resignation obligation of the plea agreement, the Court of Appeals stated that "the prosecution attempted to punish and expel a member of the state Senate, actions that are reserved solely for the Legislature. . . . Because that authority was assigned to the Legislature alone, the prosecution's *offering* of that plea-agreement term was [itself] an unconstitutional attempt to violate the separation of powers." *Id*. at 92. With regard to the bar-to-office obligation, the Court of Appeals stated that "the prosecution invaded the right of defendant's constituents to 'decide upon his moral and other qualifications' when defendant's crimes did not specifically disqualify him under Const 1963, art 11, § 8, and Const 1963, art 4, § 7." *Id*. Accordingly, "[t]he trial court properly determined that the terms of the plea agreement requiring defendant to resign from his state Senate seat and to not seek public office for five years were unconstitutional." *Id*. at 95. The Court also held that "the trial court did not abuse its discretion by denying the prosecution's motion to vacate the plea," *id*. at 98, reasoning that "[a]llowing the prosecution in the present case to make that offer, reach an agreement, and then simply have another chance at negotiation after the trial court struck the unconstitutional parts of the

agreement would send the wrong message," *id*. at 97.[4]

The prosecutor again sought leave to appeal in this Court, and we scheduled oral argument on the application with the parties to address the following three issues:

> (1) whether a prosecutor's inclusion of a provision in a plea agreement that prohibits a defendant from holding public office violates the separation of powers, see Const 1963, art 3, § 2; see also *United States v Richmond*, 550 F Supp 605 (ED NY, 1982), or is void as against public policy, *Davies v Grossmont Union High Sch Dist*, 930 F2d 1390, 1392-1393 (CA 9, 1991); (2) whether the validity of the provision requiring the defendant to resign from public office was properly before the Court of Appeals since the defendant resigned from the Michigan Senate after the Wayne Circuit Court had struck that part of the plea agreement and, if so, whether it violates the separation of powers or is void as against public policy; and (3) whether the trial court abused its discretion by voiding terms of the plea agreement without affording the prosecutor an opportunity to withdraw from the agreement, see *People v Siebert*, 450 Mich 500, 504 (1995). [*People v Smith*, 501 Mich 852, 852-853 (2017).]

II. STANDARD OF REVIEW

"[T]his Court reviews de novo constitutional questions, including those concerning the separation of powers." *Debano-Griffin v Lake Co*, 493 Mich 167, 175;

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[4] The Court of Appeals dissent again concluded that the challenged obligations of the plea agreement were not unconstitutional: "There is nothing even remotely indicating that the prosecutor crossed the threshold of the separation of powers and forcibly tried to remove defendant from office. . . . I disagree with the majority's blanket prophylactic prohibition on negotiated plea agreements between prosecutors and public elected officials." *Id*. at 103-104 (RIORDAN, J., dissenting). The dissent also concluded that "the trial court abused its discretion when it denied the prosecution's motion to vacate defendant's plea agreement." *Id*. at 105.

828 NW2d 634 (2013). Further, whether a contractual obligation is contrary to "public policy" presents a question of law that is reviewed de novo. *Terrien v Zwit*, 467 Mich 56, 61; 648 NW2d 602 (2002). Finally, a trial court's decision on a motion to vacate a plea is reviewed for an abuse of discretion. *People v Strong*, 213 Mich App 107, 111-112; 539 NW2d 736 (1995).

III. ANALYSIS

A. SEPARATION OF POWERS

Const 1963, art 3, § 2 sets forth the separation-of-powers principle of our state Constitution:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

"This Court has established that the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 296; 586 NW2d 894 (1998). Indeed, the overlapping and cross-cutting responsibilities and powers exercised by each of the three branches are properly described as the Constitution's realm of "checks and balances," a realm in which the separate responsibilities and powers of each branch are constrained or limited in some manner by the separate responsibilities and powers of the other two branches. "For example, it may be that the Legislature in exercising its legislative power to enact laws and appropriate monies will sometimes come into conflict with the Governor in exercising her executive power to recommend or veto laws and appropriations." *Nat'l Wildlife Federation v*

Cleveland Cliffs Iron Co, 471 Mich 608, 644; 684 NW2d 800 (2004), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010) (*LSEA*). " 'The true meaning [of the separation-of-powers doctrine] is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution.' " *Makowski v Governor*, 495 Mich 465, 482; 852 NW2d 61 (2014), quoting *Local 321, State, Co & Muni Workers of America v City of Dearborn*, 311 Mich 674, 677; 19 NW2d 140 (1945) (alteration in *Makowski*).

"The conduct of a prosecution on behalf of the people by the prosecutor is an executive act[.]" *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972), citing *People v Dickerson*, 164 Mich 148, 153; 129 NW 199 (1910). " 'In considering whether to permit a defendant to plead to a lesser offense, the prosecutor legitimately may consider and negotiate a penalty that he or she deems necessary to serve the interests of the People.' " *People v Siebert*, 201 Mich App 402, 415; 507 NW2d 211 (1993), quoting *People v Farrar*, 52 NY2d 302, 306-307; 419 NE2d 864 (1981).[5]

In ruling that the bar-to-office obligation violated the separation-of-powers principle, the Court of Appeals reasoned that the obligation added a qualifica-

[5] I do not believe that the "interests of the People" standard would ever likely be satisfied by an agreement imposing a bar-to-office obligation that was designed to further the prosecutor's political, partisan, or personal interests. However, no such argument has been made in this case. Rather, as the trial court stated during sentencing when voiding the obligations at issue, "I don't think that Prosecutor [Kym] Worthy's intention was anything but benign, that she had the best interest of the community."

tion for public office that is not included within our Constitution. See *Smith*, 321 Mich App at 92. I respectfully disagree. There are several constitutional provisions concerning the qualifications for public office that are pertinent to this analysis. Const 1963, art 4, § 7 generally governs the qualifications to serve in the state Legislature:

> Each senator and representative must be a citizen of the United States, at least 21 years of age, and an elector of the district he represents. The removal of his domicile from the district shall be deemed a vacation of the office. No person who has been convicted of subversion or who has within the preceding 20 years been convicted of a felony involving a breach of public trust shall be eligible for either house of the legislature.

However, Const 1963, art 4, § 8 sets forth an additional qualification to serve in the state Legislature:

> No person holding any office, employment or position under the United States or this state or a political subdivision thereof, except notaries public and members of the armed forces reserve, may be a member of either house of the legislature.

Const 1963, art 4, § 16 provides further context for the manner in which state legislative qualifications are to be determined:

> Each house, except as otherwise provided in this constitution, shall choose its own officers and determine the rules of its proceedings, but shall not adopt any rule that will prevent a majority of the members elected thereto and serving therein from discharging a committee from the further consideration of any measure. *Each house shall be the sole judge of the qualifications, elections and returns of its members*, and may, with the concurrence of two-thirds of all the members elected thereto and serving therein, expel a member. The reasons for such expulsion shall be entered in the journal, with the votes and names of the

> members voting upon the question. No member shall be expelled a second time for the same cause. [Emphasis added.]

Const 1963, art 6, § 19 similarly sets forth the qualifications of judicial officers in this state:

> (1) The supreme court, the court of appeals, the circuit court, the probate court and other courts designated as such by the legislature shall be courts of record and each shall have a common seal. Justices and judges of courts of record must be persons who are licensed to practice law in this state.
>
> (2) To be qualified to serve as a judge of a trial court, a judge of the court of appeals, or a justice of the supreme court, a person shall have been admitted to the practice of law for at least 5 years. This subsection shall not apply to any judge or justice appointed or elected to judicial office prior to the date on which this subsection becomes part of the constitution.
>
> (3) No person shall be elected or appointed to a judicial office after reaching the age of 70 years.

Const 1963, art 11, § 8 sets forth *disqualifying* characteristics that bar an individual from holding public office and certain other positions of public employment:

> A person is ineligible for election or appointment to any state or local elective office of this state and ineligible to hold a position in public employment in this state that is policy-making or that has discretionary authority over public assets if, within the immediately preceding 20 years, the person was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government. This requirement is in addition to any other qualification required under this constitution or by law.
>
> The legislature shall prescribe by law for the implementation of this section.

I would conclude that the bar-to-office obligation negotiated by the prosecutor as part of the plea agreement does not violate the separation-of-powers principle. The fundamental reality of the bar-to-office obligation is that it has been entered into *voluntarily* by defendant, and it has been entered into by defendant as an *alternative* to a looming criminal conviction that threatens as a practical matter to bar him from holding legislative office for a considerably *lengthier* time than the period of his probation under the plea agreement.[6] In other words, defendant himself would hold the key to the avoidance of this obligation, merely by dint of choosing to reject the obligation; if he does so, he is in no way subject any longer to the obligation. See *People v Sarnoff*, 302 Mich 266, 273; 4 NW2d 544 (1942) ("The condition of the probation order that Sarnoff make the necessary repairs is neither unreasonable nor improper. He may exercise the option either of making these repairs or of serving the full sentence required by law."). Presumably, however, defendant freely chose to accept the bar-to-office obligation because it was deemed to be in his personal interest to do so, and defendant, like all other criminal defendants, is entitled to avail himself of whatever personal circumstances are available in the bargaining process in exchange for reduced levels of exposure to criminal punishment.[7] It would be a feeble victory for one situated as defendant to have been "protected" against

[6] Malicious destruction of property valued at $20,000 or more, for example, is "punishable by imprisonment for not more than 10 years . . . ." MCL 750.377a(1)(a). If defendant had been convicted of that offense and sentenced to the maximum 10-year term, he would effectively have been unable to hold public office for the entirety of that term.

[7] It goes without saying that no person can be dragooned into a public office that he or she has promised to relinquish in the course of a plea agreement, or otherwise be compelled to subordinate his or her personal interest in minimizing exposure to criminal punishment.

a bar-to-office sanction on assertedly constitutional grounds when the quid pro quo is an alternative plea agreement, or no plea agreement at all, resulting in a term of imprisonment, and an effective bar to office, of a far greater length.

Put simply, defendant here may *yet* seek to hold legislative office if he is so inclined, and each house of the Legislature will continue to *retain* its constitutional powers under Const 1963, art 4, § 16 as the "sole judge of the qualifications" of its members, including those of the defendant. See *Auditor General v Bd of Supervisors of Menominee Co*, 89 Mich 552, 567-568; 51 NW 483 (1891) ("Courts will not undertake to decide upon the right of a party to hold a seat in the legislature where, by the constitution, each house is made the judge of the election and qualifications of its own members.") (quotation marks and citation omitted). And in the event that he is, in fact, reelected to legislative office, neither the prosecutor nor this Court may determine that he lacks the right to hold such office by virtue of the obligations to which he would have committed himself under the plea agreement, but as to which he would have reneged. While there will be consequences for such a decision on defendant's part, they will be the same consequences that burden any criminal defendant who reneges on his or her plea obligations. Accordingly, the bar-to-office obligation neither adds a constitutional or other qualification for legislative office nor infringes either house's power to judge the election and qualifications of its own members[8] and thus does not violate the separation-of-powers principle.

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[8] To the extent that the bar-to-office obligation also bars defendant from holding *judicial* office, I would conclude similarly that the obligation does not add to the constitutional provisions concerning the qualifications of judicial officers. Nor does the obligation infringe this Court's principal authority to determine those qualifications.

Several cases from other jurisdictions have indicated that bar-to-office obligations as part of probation orders are valid, although these cases have given little consideration to the separation of powers implications. See, e.g., *State v Williams*, 82 Ohio App 3d 70, 72; 611 NE2d 443 (1992) ("Defendant contends the trial court abused its discretion in ordering as a condition of probation that she not hold any public office during the five-year probation period. We are unpersuaded."); *United States v Tonry*, 605 F2d 144, 151 (CA 5, 1979) ("If confined, [Congressman] Tonry could have offered himself as a candidate for state office. The condition of his probation made it impossible for him, without risking incarceration, to do as a member of the public what he could have done as a prisoner. This seeming anomaly is illusory . . . ."), abrogated on other grounds as recognized by *Phillips v City of Dallas*, 781 F3d 772 (CA 5, 2015); *City of Baldwin v Barrett*, 265 Ga 489, 490; 458 SE2d 619 (1995) ("Barrett entered into a bargain with the district attorney to forego seeking or holding public office in exchange for the dismissal of certain criminal charges and for lenient treatment following his plea of guilty to two felony offenses. . . . The agreement was sanctioned by the court and incorporated into the sentencing order as a condition of probation."). I believe it likely that the *absence* of an abundance of caselaw, particularly from Michigan, concerning the proposition in dispute arises from the simple and straightforward fact that most defendants who have negotiated such bar-to-office obligations in exchange for reduced criminal penalties have recognized their advantageousness, as well as their binding nature, and complied with such obligations, absent any appeal.

On the other hand, I acknowledge that other cases, *United States v Richmond*, 550 F Supp 605 (EDNY, 1982), and *Leopold v State*, 216 Md App 586; 88 A3d 860

(2014), have held that such obligations are violative of the separation-of-powers principle. In *Richmond*, for example, the United States District Court for the Eastern District of New York concluded that the obligations of a plea agreement requiring a Congressman to resign and withdraw as a candidate for reelection were void, reasoning that "[p]ower to strip a member of Congress of elective office was committed to neither the executive nor the judiciary. It was explicitly reserved to Congress itself." *Richmond*, 550 F Supp at 608. One case on which *Richmond* relied heavily, but inaptly, in my judgment, was *Powell v McCormack*, 395 US 486; 89 S Ct 1944; 23 L Ed 2d 491 (1969). In that case, the United States Supreme Court concluded that "in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution." *Id*. at 550. *Powell* was not a separation-of-powers case; rather, it concerned the power of the United States House of Representatives to exclude an elected Congressman from the 90th Congress. *Id*. at 549.[9] Moreover, for the reasons explained previously, the bar-to-office obligation here does not add a qualification for office or infringe the power of a branch of government to determine the qualifications of its own members, so cases such as *Powell* have no bearing. I accordingly conclude that the bar-to-office obligation does not violate the separation-of-powers principle, and I would reverse the Court of Appeals' ruling to the contrary.[10]

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[9] The United States Supreme Court held that Congressman Adam Clayton Powell Jr. could be "expelled" by a two-thirds vote of the House of Representatives, but he could be denied membership by a simple majority vote only if he failed to satisfy the constitutional prerequisites for membership. See US Const, art I, § 5.

[10] Because the issue concerning the resignation obligation is moot and defendant can no longer resign from office, this case does not implicate constitutional provisions concerning *expulsion* from office. See, e.g.,

B. PUBLIC POLICY

"Although the analogy may not hold in all respects, plea bargains are essentially contracts." *Puckett v United States*, 556 US 129, 137; 129 S Ct 1423; 173 L Ed 2d 266 (2009). However, with regard to plea agreements, "[t]he standards of commerce do not govern, and should not govern, the administration of criminal justice." *People v Reagan*, 395 Mich 306, 314; 235 NW2d 581 (1975). That is, plea agreements "are more than contracts between two parties." *People v Siebert*, 450 Mich 500, 509; 537 NW2d 891 (1995). "The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State." *Ricketts v Adamson*, 483 US 1, 16; 107 S Ct 2680; 97 L Ed 2d 1 (1987) (Brennan, J., dissenting). Nonetheless, the public-policy principles applicable to commercial contracts may to a certain extent be relevant in evaluating the validity of plea agreements. *United States v Yemitan*, 70 F3d 746, 748 (CA 2, 1995) ("Plea agreements are subject to the public policy constraints that bear upon the enforcement of other kinds of contracts.").

" 'Contracts contrary to public policy, that is those which tend to be injurious to the public or against the public good, are illegal and void, even though actual injury does not result therefrom.' " *Federoff v Ewing*, 386 Mich 474, 481; 192 NW2d 242 (1971), quoting 17 CJS, Contracts, § 211, pp 563-565. " 'The principle that contracts in contravention of public policy are not

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Const 1963, art 5, § 10 ("The governor . . . may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial . . . .").

enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests.' " *Skutt v Grand Rapids*, 275 Mich 258, 264; 266 NW 344 (1936), quoting *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356-357; 51 S Ct 476; 75 L Ed 1112 (1931). "The public policy of Michigan is *not* merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law." *Terrien*, 467 Mich at 67.

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's. [*Id.* (quotation marks and citations omitted).]

" 'The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials.' " *Skutt*, 275 Mich at 265, quoting *United States v Trans-Missouri Freight Ass'n*, 166 US 290, 340; 17 S Ct 540; 41 L Ed 1007 (1897). "In ascertaining the parameters of our public policy, we must look to 'policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.' " *Rory v Continental Ins Co*, 473 Mich 457, 471; 703 NW2d 23 (2005), quoting *Terrien*, 467 Mich at 66-67.

Defendant, as the party challenging the bar-to-office obligation, bears the burden of showing that it is on some grounds void as against public policy. See *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, 500 Mich

32, 42; 892 NW2d 794 (2017) ("Plaintiff seeks to avoid this agreement and therefore holds the burden of proving that the contract is invalid."); *Larsen v Burroughs*, 224 Iowa 740; 277 NW 463, 465 (1938) ("[T]he burden of proof that such a contract is contrary to public policy is upon him who asserts it."). In my judgment, not only has defendant (and the lead opinion and concurrence) failed to show that the bar-to-office obligation is void as against public policy, but the preponderance of public policy, in fact, weighs in *favor* of upholding that obligation for the following reasons.

First, the United States Supreme Court has recognized the public policy in favor of guilty pleas. "For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated." *Brady v United States*, 397 US 742, 752; 90 S Ct 1463; 25 L Ed 2d 747 (1970). "For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof." *Id*.

Moreover, this Court has recognized the public policy in favor of plea bargaining, which is the principal means of securing guilty pleas:

> "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the

> corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." [*People v Killebrew*, 416 Mich 189, 198; 330 NW2d 834 (1982), quoting *Santobello v New York*, 404 US 257, 261; 92 S Ct 495; 30 L Ed 2d 427 (1971).]

Put simply, "the general practice of plea bargaining withstands constitutional scrutiny and offers significant benefits to both the defendant and the state." *Killebrew*, 416 Mich at 198. Such benefits include, most notably, the " 'prompt and largely final disposition' " of the case. *Id*., quoting *Santobello*, 404 US at 261. These benefits, in my judgment, weigh in favor of allowing the prosecutor and the defendant to negotiate the obligations of the plea agreement free from the kind of judicial interference that would constitute a very real breach of the separation-of-powers principle.[11] Michigan's longstanding public policy in support of respecting freely and fairly reached plea agreements between the prosecutor and criminal defendants serves the interests of both parties, and both such interests can legitimately be cast as "public interests" in terms of the conservation of limited public resources for the highest priority criminal justice purposes.[12]

Second, even beyond the plea-bargaining context, trial courts are permitted to impose individualized

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[11] "The trial judge's role in the plea-bargaining procedure" should "remain that of a detached and neutral judicial official." *Killebrew*, 416 Mich at 205.

[12] See, e.g., MCR 6.302(C)(1) (stating that a plea of guilty or *nolo contendere* may be entered in accordance with a plea agreement between "the prosecutor and the defendant's lawyer"); *Killebrew*, 416 Mich at 199 & n 1 (noting, in the context of "charge bargaining," that

sentences for probation, depending on the circumstances of the criminal and the crime itself. Specifically, MCL 771.3(2) lists several obligations that the trial court may impose on the probationer, such as "[e]ngage[ment] in community service." MCL 771.3(2)(e). And MCL 771.3(3) adds that "[t]he court may impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper." Thus, MCL 771.3(3) provides the trial court with broad authority to impose unique and highly personal obligations of probation. I see no reason why the bar-to-office obligation stands outside this broad grant of authority.

Third, additional law of this state—in particular, our Constitution and statutes—suggests that the bar-to-office obligation is valid. While Const 1963, art 11, § 8 only disqualifies a person from "election or appointment to any state or local elective office of this state" when he or she "within the immediately preceding 20 years . . . was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government," that provision further states that "[t]his requirement is *in addition to any other qualification required under this constitution or by law*." (Emphasis added.) Thus, Const 1963, art 11, § 8 expressly contemplates that conduct extending beyond the specifically described felonies involving "dishonesty, deceit, fraud, or a breach of the public trust" while holding "elective office" may operate as an effective limitation upon

"[t]he decision to prosecute under one statute rather than another, or to prosecute at all, is an exclusively executive function, vested within the discretion of the prosecutor").

holding public office. For instance, although Const 1963, art 11, § 8 only includes a 20-year bar to office for individuals convicted of such felonies, MCL 750.118 provides that "[a]ny executive, legislative or judicial officer who shall corruptly accept any gift or gratuity . . . shall forfeit his office, and be *forever disqualified* to hold any public office . . . ." (Emphasis added.) And although the 20-year bar to office of Const 1963, art 11, § 8 only applies when an individual is convicted of one of the specifically described felonies "while the person was holding any elective office," MCL 169.267, which imposes a $2 million limitation on expenditures by a "candidate committee," provides that "[i]f a person who is subject to this section is found guilty, the circuit court, on application by the attorney general, may prohibit that person from assuming the duties of a public office or from receiving compensation from public funds, or both." MCL 169.267(4). That is, an individual convicted of violating MCL 169.267 may be prohibited from holding public office even if the violation did not occur while he or she was holding public office. Simply stated, to the extent that the public policy of this state is derived from its Constitution and statutes, such policy seemingly stands in *disfavor* of allowing those with serious criminal records to serve in public office.[13]

I further believe that the bar-to-office obligation is consistent with the principle that the rule of law fundamentally "ensures equality of treatment under the law." *LSEA*, 487 Mich at 435 (CORRIGAN, J., dissenting). Accordingly, we have long recognized that simi-

[13] I emphasize that a serious criminal record is not a categorical bar to holding public office in this state. However, I can discern no "public policy" against individuals with such records voluntarily refraining from holding public office when to do so offers them some personal advantage.

larly situated criminal defendants must be treated equally by the criminal justice system. See, e.g., *People v Bussey*, 82 Mich 49, 60; 46 NW 97 (1890) ("It certainly can be no reproach to any section of our country that all men are treated equally, and served alike, before the law, and that in a criminal trial the worst man in the estimation of the community has the full benefit, with the best, of the presumption that every man is innocent until proven guilty."); *People v Wakeford*, 418 Mich 95, 105 n 7; 341 NW2d 68 (1983) ("It would offend rationality, as well as our sense of equal justice, to require treatment of one defendant committing a single crime identically with another defendant committing four counts of the same crime in the 'same transaction.' "). Therefore, under the equal rule of law, defendant should be treated the same as any other criminal defendant within the criminal justice system. That is, he should be subject to the same sanctions for his criminal conduct as would any other criminal defendant who committed the same criminal conduct. Similarly, he should be entitled to avail himself of the same rights and defenses in a criminal proceeding as any other criminal defendant. But most importantly, in my judgment, he, like any other criminal defendant engaged with prosecutors in the plea-bargaining process, should be allowed to bring to bear the fullest range of personal circumstances in securing maximum bargaining leverage on his own behalf.[14] Concluding otherwise would mean that defendant because of his status as a

[14] As an example, the relatively serendipitous fact that a relative of a criminal defendant may also be facing prosecution has always been viewed as a proper subject of plea negotiations. See *Miles v Dorsey*, 61 F3d 1459, 1468 (CA 10, 1995) ("[S]o long as the government has prosecuted or threatened to prosecute a defendant's relative in good faith, the defendant's plea, entered to obtain leniency for the relative, is not involuntary.").

politician would be treated differently from other criminal defendants who are engaged in other career fields and who may freely choose to forgo their right to work in those particular fields in exchange for reduced criminal penalties. Who would doubt, for example, that a banker who had embezzled funds could voluntarily agree to remain outside that profession in the future in exchange for value in the context of a plea agreement? While the politician certainly has no greater rights than do nonpoliticians in the plea-bargaining process, he or she should also bear no greater disabilities in negotiating on his or her own behalf.

Criminal defendants, such as the instant defendant himself, would be placed at a distinct disadvantage if they could not utilize their future potential to hold public office as a bargaining chip on their own behalf in pursuit of reduced criminal penalties, just as all other defendants can similarly avail themselves of their own unique circumstances. I do not doubt that criminal defendants engaged in such bargaining are often faced with extraordinarily difficult options, placed between Scylla and Charybdis as it were, but I also do not doubt that free and uncoerced decision-making can nonetheless emerge from this process and that such decision-making should as a general proposition be respected.

In ruling that the bar-to-office obligation is void as against public policy, the Court of Appeals reasoned that "[t]acit permission for prosecutors to engage in such negotiations, even if done innocently at the time, could open the door for the executive branch to use its power of prosecution (and the threat of imprisonment) to remove from elected office those officials who do not align with the political preferences of the executive branch." *Smith*, 321 Mich App at 93. Similarly, the lead opinion here reasons that "[g]iving prosecutors unfet-

tered discretion to decide which defendants should be excluded from office would allow political considerations to enter into the prosecutor's charging calculus." *Ante* at 635-636. I believe that this concern is vastly overstated.

"We have previously recognized that the decision whether or not to prosecute, and what charge to bring, generally rests in the prosecutor's discretion." *People v Johnson*, 427 Mich 98, 113; 398 NW2d 219 (1986) (opinion by BOYLE, J.). And there can be no dispute that a prosecutor possesses the discretion to bring charges against a public official, even when those charges would result in that official's exclusion from public office, so long as the charges are justified by the law and facts of the case. When, however, the charges are wholly unjustified and constitute an abuse of power, courts may intervene to protect the public official as they would any other defendant. See, e.g., *People v Grove*, 455 Mich 439, 461 n 27; 566 NW2d 547 (1997) ("[A] prosecutor's determination of what charges to bring is subject to judicial review only for an abuse of power . . . ."), superseded by court rule on other grounds as stated in *People v Franklin*, 491 Mich 916 (2012). I discern little principled basis for distinguishing the ordinary case in which a prosecutor is enabled to bring charges against a public official and the case in which the prosecutor negotiates a bar-to-office obligation in a plea agreement. In both instances, there are significant implications for the people's decision to confer representative authority upon a particular individual, and the prosecutor's conduct is always subject to review and scrutiny for an abuse of power. I would decline, however, to *categorically* bar prosecutors from negotiating bar-to-office obligations out of the speculative concern that a prosecutor might on some future occasion abuse his or her powers in order to gain

political, partisan, or personal advantage. Our entire criminal justice system is predicated on the proposition that prosecutors will act honorably, and that proposition ought to be extended to the core prosecutorial responsibility addressed in this case: the negotiation of guilty pleas. As with every other responsibility of the prosecutor, his or her exercise of *this* responsibility should be subject to the regular review of courts, state disciplinary authorities, the media, and the public, rather than categorically prohibited on the off chance that the power might someday be abused.[15]

Therefore, I would hold that the bar-to-office obligation is in no way void as against public policy and would reverse the Court of Appeals' ruling to the contrary.[16]

IV. RESPONSE TO LEAD OPINION

In concluding that the bar-to-office obligation is void as against public policy, the lead opinion reasons that "[b]y restricting the eligibility of defendant to run for

[15] Moreover, I am unaware of the slightest evidence that any prosecutor of this state has ever imposed a bar-to-office condition in circumstances giving rise to concerns about the politicization, partisanship, or taking of personal advantage on the part of the prosecutor. And of course, there is not the slightest evidence that the prosecutor in the *instant* case has been motivated by such considerations. See note 5 of this opinion. The Court of Appeals' and the lead opinion's reasoning, if accepted, would, of course, also lead to the slippery-slope conclusion that prosecutors should not be enabled to bring charges against public officials in the first place because this too would potentially "open the door" to exactly the same concerns of politicization, partisanship, and personal advantage raised by the lead opinion in this case.

[16] Having concluded that the issue concerning the resignation obligation is moot and that the bar-to-office obligation is constitutional and not void as against public policy, I need not address the prosecutor's argument that the trial court abused its discretion by denying her motion to vacate the plea *after* ruling that those two obligations were invalid.

office, the bar-to-office provision restricts the foundational right of voters to select their representatives." *Ante* at 642. I respectfully disagree because that "foundational right" is not, in my judgment, the proper focus of the required public-policy analysis.

When considering whether to void a contractual obligation on the basis of public policy, the public policy "is to be ascertained 'by reference to the laws and legal precedents and *not from general considerations of supposed public interests*.' " *W R Grace & Co v Local Union 759*, 461 US 757, 766; 103 S Ct 2177; 76 L Ed 2d 298 (1983), quoting *Muschany v United States*, 324 US 49, 66; 65 S Ct 442; 89 L Ed 744 (1945) (emphasis added). That is, "absent some *specific basis* for finding them unlawful, courts cannot disregard private contracts and covenants in order to advance a particular social good." *Terrien*, 467 Mich at 70 (emphasis added). In *Terrien*, this Court quoted Justice Scalia to explain when a purported "public policy" may be sufficient to justify voiding a contractual provision: " 'There is not a single decision, since this Court washed its hands of general common-lawmaking authority, in which we have refused to enforce on "public policy" grounds an agreement that did not violate, or provide for the violation of, some positive law.' " *Id*. at 68 n 12, quoting *Eastern Associated Coal Corp v United Mine Workers of America, Dist 17*, 531 US 57, 68; 121 S Ct 462; 148 L Ed 2d 354 (2000) (Scalia, J., concurring). Thus, for example, in *Mulliken v Naph-Sol Refining Co*, 302 Mich 410; 4 NW2d 707 (1942), this Court ruled that a contract that fixed the price of gasoline was void as against public policy because it violated a statute prohibiting price-fixing to undermine competition. To substitute in the *public-policy* analysis—one predicated upon genuine public policies—a vague and generalized *public-interest* analysis is to substitute judi-

cial preferences for those actually enacted and adopted by the people; the former are grounded in some way in actual and concrete policies and practices, while the latter are so overarching that, while they may indeed be legitimate public interests, they are also subject to countless exercises in balancing with contrary public interests.

Of course, I agree with the lead opinion that as a broad and general proposition, the people have a "foundational right" in the freedom to vote for individuals of their choice. However, this is largely an aspirational goal that must often give way to contrary interests. In this regard, the *people* themselves, through their own representative legal processes, have imposed limitations on the universe of individuals from among whom they may elect their public officials. There are minimum,[17] and maximum,[18] age restrictions on candidates; there are restrictions in terms of a person's criminal history;[19] there are restrictions in terms of the process by which candidates must pursue a position on the ballot;[20] there are residency restrictions;[21] there are

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[17] See, e.g., MCL 168.51 ("A person shall not be eligible to the office of governor or lieutenant governor unless the person has attained the age of 30 years . . . .").

[18] See, e.g., MCL 168.391(1) ("[A] person shall not be eligible to the office of justice of the supreme court unless the person . . . at the time of election or appointment is less than 70 years of age.").

[19] See, e.g., MCL 750.118 (providing that a public officer who is found guilty of accepting a bribe under that statute is "forever disqualified to hold any public office").

[20] See, e.g., MCL 168.163(1) (providing that "a candidate for nomination by a political party for the office of state senator or representative" must file "nominating petitions signed by a number of qualified and registered electors residing in the district as determined under" MCL 168.544f).

[21] See, e.g., MCL 168.161(1) ("A person shall not be eligible to the office of state senator or representative unless the person is a citizen of the United States and a registered and qualified elector of the district he or she represents by the filing deadline . . . .").

citizenship restrictions;[22] there are restrictions based on the lack of registration as an elector;[23] there are educational restrictions;[24] there are professional restrictions;[25] there are restrictions grounded in the discretion of the Legislature;[26] there are restrictions based on the judgments of political conventions;[27] there are restrictions based on *when* a person decides to become a candidate;[28] and perhaps most significantly and most pertinently, there is the logical threshold requirement that a person must himself or herself *assent* to being placed upon the ballot. As such restrictions illustrate, there is no singular "public policy" concerning the right of the voters to elect whomever they choose. I am hard-pressed, in light of these and other restrictions upon the "voters' right" to select representatives of their choice, to understand why today we establish as the "public policy" of this state, after 180 years in which there was no such "public policy," that a bar-to-office obligation, imposed by a court of law, as part of an arm's-length plea agreement, pertaining to a felony offense, and agreed to by both prosecutor and

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[22] *Id*.

[23] *Id*.

[24] See, e.g., MCL 168.411(1) ("A person shall not be eligible to the office of judge of the circuit court unless the person . . . is licensed to practice law in this state . . . ."); MCL 600.940(1) (providing that graduation from law school is a prerequisite to obtaining a license to practice law).

[25] See note 24 of this opinion.

[26] See, e.g., Const 1963, art 2, § 4 ("The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States.").

[27] See, e.g., MCL 168.392 ("At its fall state convention, each political party may nominate the number of candidates for the office of justice of the supreme court as are to be elected at the next ensuing general election.").

[28] See note 21 of this opinion.

defendant, should be rendered void. Once again, the lead opinion has identified no positive law and no specific policy that the bar-to-office obligation allegedly violates.[29] It has only identified a broad and generalized public interest in the people voting for persons of their choice that has been limited on many occasions in favor of other more particularized interests.[30]

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[29] At most, the lead opinion highlights MCL 168.931, which defines unlawful solicitation of "valuable consideration" from a candidate as including "money, property, a gift, a prize or chance for a prize, a fee, a loan, an office, a position, an appointment, or employment." MCL 168.931(4). Notably, each of those things is generally understood as having economic value, and any applicability to criminal cases, plea bargaining, or both is considerably far-fetched.

[30] I also disagree with the lead opinion's decision to import the test from *Davies*, a decision of the United States Court of Appeals for the Ninth Circuit. "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004) (citation omitted). Indeed, *Davies* did not even apply federal law that has particular relevance to this Court, such as Fourth Amendment law. Rather, *Davies* applied the federal common law. But absent a " 'uniquely federal interest[],' " *Boyle v United Technologies Corp*, 487 US 500, 504; 108 S Ct 2510; 101 L Ed 2d 442 (1988) (citation omitted), that has not been advanced here, we must apply Michigan law. That is, when deciding whether a contract obligation is void as against the public policy of Michigan, we must consider the indicators of public policy in Michigan. See *Terrien*, 467 Mich at 68 ("As the term 'public policy' is vague, there must be found definite indications in *the law of the sovereign* to justify the invalidation of a contract as contrary to that policy.") (quotation marks and citation omitted; emphasis added). *Town of Newton v Rumery*, 480 US 386; 107 S Ct 1187; 94 L Ed 2d 405 (1987), another case on which the lead opinion relies, is also inapposite. *Rumery* concerned the federal common law, *id*. at 392, and a release-dismissal agreement, *id*. at 393. This case concerns neither the federal common law nor release-dismissal agreements. Examining federal law to resolve this case is as inapt as examining Montana law for the same purpose. See Mont Code Ann 46-18-202(1)(a) ("The sentencing judge may also impose any of the following restrictions or conditions on the sentence provided for in 46-18-201 that the judge considers necessary to obtain the objectives of rehabilitation and the protection of the victim and society: (a) prohibition of the offender's holding public office . . . .").

Furthermore, I believe the lead opinion errs by assuming that the bar-to-office obligation would be specifically enforced by the judiciary if defendant decides to seek and hold public office. *Ante* at 636 ("Regardless of the prosecutor's motivations, a plea bargain that prevents an individual from holding public office has the same effect as a release-dismissal agreement that bars an individual from office."). This, however, is not how the bar-to-office obligation operates. Rather, for the reasons explained earlier in this opinion, defendant fully retains the option of seeking and holding public office, and if he does so, neither the trial court nor the prosecutor possesses the authority to stop him from doing so, or to remove him from public office if elected, because he has violated that obligation of probation. A breach of the bar-to-office obligation does not allow either the prosecutor or the judiciary to specifically enforce the obligation, but simply renders the plea agreement null and void, potentially subjecting the defendant to criminal penalties of which he had been relieved in whole or in part by the agreement.[31] Therefore, the bar-to-office obligation does not even restrict the right of voters to elect whomever they choose, including the defendant, but they do not have the right to dragoon into a candidacy a person who views his or her personal interests to lie elsewhere.[32]

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[31] See MCL 771.4 ("All probation orders are revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition . . . .").

[32] Even if I accepted the premise that the bar-to-office obligation operates somehow as a restriction on the right of voters to elect whomever they choose, I still fail to grasp how it follows that the bar-to-office obligation is void in its entirety. By even the lead opinion's analysis, the bar-to-office obligation would only seemingly be void to the extent that it concerned *elected* office. To the extent that it concerned *appointed* office, this seemingly would not implicate the "voters' right" to elect public officials of their choice.

Of course, as a practical matter, defendant may be less inclined to seek and hold public office because he may want to retain the benefits of his plea agreement, particularly the reduction of his criminal penalties. However, to the extent that defendant is less inclined to seek and hold public office for this reason, this is exclusively a function of his own decision to have, first, engaged in criminal conduct and, secondly, to have agreed upon the bar-to-office obligation. Put simply, he freely decided as part of a plea agreement to forgo his right to hold public office in order to avoid greater criminal penalties, and he is entitled to act in own his best interests in limiting the extent of such exposure. To conclude otherwise would mean that an individual could decide against seeking and holding public office for a variety of self-interested reasons, but could not do so for the single self-interested reason that he or she would be subject to lesser criminal penalties. While the electorate as a general proposition has the right to elect individuals of its own choosing, it does not have the right to elect individuals who *themselves choose* not to run for public office for their own reasons, whatever these may be.[33]

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[33] It would be anomalous to conclude otherwise. Under MCL 168.758b, "[a] person who . . . has been legally convicted and sentenced for a crime for which the penalty imposed is confinement in jail or prison shall not vote, offer to vote, attempt to vote, or be permitted to vote at an election while confined." That is, a person cannot vote while serving time in jail or prison after conviction. Thus, for example, a person who is convicted of felonious assault and sentenced to the maximum prison term of four years, MCL 750.82(1), cannot vote for anyone, including himself or herself, for public office during that time. It is difficult to conclude that the voters' right to elect public officials of their own choosing would be violated by a prohibition against the person holding public office during that time, where that person cannot even vote for himself or herself during that time. Why, then, can a trial court not impose a bar-to-office obligation for four years or less for the same crime, when the defendant is not in prison but rather on parole or probation and when the defendant has specifically agreed to accept such an obligation?

The lead opinion also identifies a secondary purported "public policy" in voiding the bar-to-office obligation: that public offices "should not be treated like private property." *Ante* at 638. Once again, while one could hardly disagree that there is such a public interest, this public interest is also too broad and generalized to be considered a genuine "public policy" sufficient to void a bar-to-office provision of a plea agreement; that public offices "should not be treated like private property" is an obvious proposition of good government, but because of its very breadth it begs the question whether this interest is best facilitated by *disallowing* corrupt and criminal politicians from entering into plea agreements not to run for future public office or *encouraging* them not to do so. It is like most public *interests*, as opposed to public *policies*, subject to the normal give-and-take of public and judicial debate. In the end, the lead opinion's "public interest" sounds more as a function of judicial preference than as an actual policy determination undertaken by the people themselves. It is again a merely aspirational goal rather than a concrete and bona fide public policy.[34]

Finally, by concluding that the bar-to-office obligation is void because there is no " 'close nexus' . . . between the charged offenses and defendant's conduct in office," *ante* at 644, I respectfully believe the lead

[34] Moreover, candidates for public office regularly enter into contracts to pay television stations for advertising time. Yet, in a sense, such contracts, in the lead opinion's words, "commoditize" public office because the television station profits from the fact that the public office exists and the candidate is seeking it. Similarly, candidates for public office regularly contract to pay individuals to work on their campaigns. Again, such contracts "commoditize" public office because the individuals who receive payment benefit from the fact that the public office exists and the candidate is seeking it. But no one would suggest that either such type of contract is void as against public policy because it "commoditizes" public office.

opinion fails to give sufficient consideration to the fact that this case is criminal in nature and concerns a voluntary plea agreement. Our law has never before required a "close nexus" between an obligation of probation and the crime committed by the defendant, particularly when the obligation at issue constitutes part of a plea agreement. If a "close nexus" were required by the law, I submit that probation proceedings in general would be transformed. For instance, MCL 771.3(2)(e) provides that "[a]s a condition of probation, the court may require the probationer to . . . [e]ngage in community service." And MCL 771.3(2)(q) provides that the court may require the probationer to "[c]omplete his or her high school education or obtain the equivalency of a high school education in the form of a general education development (GED) certificate." I see no reason why a defendant should not be allowed to agree to such obligations of probation, even when the obligations lack a "close nexus" to the crimes that he or she has committed. Such obligations presumably serve the benefit of both the public and the defendant, and it is not the role of this Court to micromanage a novel "close nexus" requirement.

In summary, the bar-to-office obligation is sustained by actual "public policies" grounded in the law of this state, and the allegedly competing "public *interests*" identified by the lead opinion in voiding that obligation are overly broad, overly generalized, and overly aspirational in nature. The lead opinion has simply not satisfied *its* burden of showing that the bar-to-office obligation is void as against public policy, and therefore the obligation should be sustained. Accordingly, I respectfully dissent from this part of the lead opinion.

V. RESPONSE TO CONCURRENCE

My disagreement with the concurrence is even more substantial. While the lead opinion apparently leaves open the possibility that a defendant could agree to a bar-to-office obligation as part of a plea agreement if there is a "close nexus" between the holding of public office and the crimes committed by the defendant—such as, perhaps, when the defendant has accepted bribes while holding public office—the concurrence would establish an unvarying rule that a defendant simply cannot "bargain[] away his ability to run for office for something of value to him: less-punitive criminal charges." *Ante* at 650 (CLEMENT, J., concurring in part). This rule, in my judgment, would undermine the effective prosecution and punishment of public corruption. For example, a public official who violates MCL 750.118 is, by law, "forever disqualified to hold any public office . . . ." Yet, following the rationale of the concurrence, such an official could never enter into a plea for a reduced charge that included a bar-to-office obligation, as this would constitute "bargaining away his ability to run for office for something of value." While it might well be the case that a plea of any sort is ill-advised in a particular case, I do not understand what "public policy" informs the conclusion that the prosecutor cannot under any circumstance through a voluntary agreement with a defendant seek to ensure that he or she not be returned to public office. This is an entirely judicially manufactured "public policy" that is incompatible with this state's *actual* "public policy," one determined by the elected representatives of the people.

Furthermore, in reciting its rule that a defendant can never "bargain away his ability to run for office,"

the concurrence relies on cases that concern corruption or the possibility of corruption in the *agreement itself*. See, e.g., *Benson v Bawden*, 149 Mich 584, 587; 113 NW 20 (1907) ("The postmaster must exercise his official judgment. He should be disinterested. That he may be hired to act in the interest of any individual is shocking to a decent sense of propriety."). However, " '[t]he principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly *within the reasons on which that doctrine rests*.' " *Skutt*, 275 Mich at 264 (citation omitted; emphasis added). See also Restatement Contracts, 2d, § 178(3)(b), p 7 ("In weighing a public policy against enforcement of a [contractual] term, account is taken of . . . the likelihood that a refusal to enforce the term will further that policy . . . ."). The reason specifically for the public policy against the sale of office by contract—the potential for corrupt behavior occasioned by the agreement itself—is not reasonably implicated in cases in which the bar-to-office obligation is agreed to by both the prosecutor and the defendant in the course of an arm's-length criminal plea proceeding and overseen by a judicial tribunal. That is, invalidating the bar-to-office obligation under the circumstances of *this* case, by plea agreement, as should be obvious to all, would in no way impede corrupt behavior or corrupt agreements.[35] Because this case implicates none of the

[35] The cases cited by the concurrence in support of its broad rule that a defendant cannot "bargain[] away his ability to run for office for something of value to him" concerned private, commercial contracts. See, e.g., *Snyder v Willey*, 33 Mich 483 (1876) (voiding a promissory note on the basis of public policy). However, as already noted, "[t]he standards of commerce do not govern, and should not govern, the administration of criminal justice." *Reagan*, 395 Mich at 314.

"reasons" pertaining to the public policy against the sale of public office, I would reject the analysis[36] of the concurring opinion.[37]

VI. CONCLUSION

Defendant voluntarily and with the advice of counsel entered into a plea agreement whereby he agreed to resign from the Legislature and to refrain from holding elected or appointed office for the duration of his five-year probation. He now challenges these obligations while seeking to retain the remainder of the benefit derived from his plea agreement. I agree with the lead opinion that the resignation obligation is moot

[36] If the concurrence is correct that the bar-to-office obligation is void as against public policy under the common-law rule against the sale of office by contract, as a matter of consistency, it might also consider the corollary to that rule: that the courts nonetheless will not restore the parties to their original position. *Snyder*, 33 Mich at 497 ("[T]he court can never recognize any rule by which the plaintiff must either have an enforcement of the promise made to him or else be put back where he was before he acted in furtherance of his illegal agreement[.]"). However, the concurrence agrees with the lead opinion that this case should be remanded to the trial court to allow "the prosecutor to withdraw from the [plea] agreement." *Ante* at 658 (CLEMENT, J., concurring in part). That is, the concurrence agrees with the lead opinion that the prosecutor should be put back to her original position before she "acted in furtherance of [her] illegal agreement." I see no reason why the concurrence would treat the instant case, a criminal case involving a plea agreement, differently from cases such as *Snyder*, unless, in fact, there *are* principled distinctions between the instant case and commercial cases such as *Snyder*.

[37] There is also at least some small irony in a decision purportedly grounded in "voters' rights" and the democratic will, emerging from the *least* representative branch of state government and categorically barring *all* bar-to-office pleas, notwithstanding the many exceptions to the asserted "public policy" that have emerged from the democratic process itself, see notes 17 to 28 of this opinion, not least of which is the concurrence's proposed nullification of the decisions of elected and accountable prosecutors not only in the instant case but in all future cases as well.

and that the part of the Court of Appeals judgment addressing that issue is properly vacated. However, after consideration of the separation-of-powers principles set forth within our Constitution and the public policy reflected by Michigan law, I would conclude that the bar-to-office obligation of the plea agreement is entirely valid and thus disagree with the lead opinion and the concurrence to the extent they conclude otherwise. Accordingly, I would reverse the Court of Appeals to the extent that it ruled that the bar-to-office obligation was invalid and remand the case to the trial court for further proceedings.

ZAHRA and WILDER, JJ., concurred with MARKMAN, C.J.

MICHIGAN GUN OWNERS, INC v ANN ARBOR PUBLIC SCHOOLS

MICHIGAN OPEN CARRY INC v CLIO AREA SCHOOL DISTRICT

Docket Nos. 155196 and 155204. Argued on application for leave to appeal April 11, 2018. Decided July 27, 2018.

In Docket No. 155196, Michigan Gun Owners, Inc., and Ulysses Wong brought an action in the Washtenaw Circuit Court against the Ann Arbor Public Schools (AAPS), challenging three AAPS policies that banned the possession of firearms in schools and at school-sponsored events. Plaintiffs asserted that AAPS was a local unit of government under MCL 123.1101 and that, as such, they were preempted by state law from regulating the possession of firearms. The parties filed cross-motions for summary disposition. The court, Carol A. Kuhnke, J., granted AAPS's motion for summary disposition and dismissed plaintiffs' complaint with prejudice, ruling that AAPS was not a local unit of government under MCL 123.1101 and that state law did not preempt AAPS's policies under the four-factor analysis set forth in *People v Llewellyn*, 401 Mich 314, 323-324 (1977). The Court of Appeals, K. F. KELLY, P.J., and GLEICHER and SHAPIRO, JJ., affirmed, 318 Mich App 338 (2016), and plaintiffs sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 501 Mich 941 (2017).

In Docket No. 155204, Michigan Open Carry Inc. and Kenneth Herman brought an action in the Genesee Circuit Court against the Clio Area School District (CASD), Fletcher Spears III, and Katrina Mitchell, alleging that defendants had improperly denied Herman access to his child's elementary school while he was openly carrying a pistol under a CASD policy that banned the possession of firearms in CASD schools and at public events. The court, Archie L. Hayman, J., granted summary disposition and entered a declaratory judgment in plaintiffs' favor, ruling that, under *Capital Area Dist Library v Mich Open Carry, Inc*, 298 Mich App 220 (2012) (*CADL*), CASD was a quasi-municipal corporation that was preempted from attempting to regulate in the field of firearm regulation. The Court of Appeals, K. F. KELLY, P.J., and GLEICHER and SHAPIRO, JJ., reversed, 318 Mich App 356 (2016), and defendants sought leave to appeal. The Supreme

Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 501 Mich 941 (2017).

In an opinion by Justice MCCORMACK, joined by Justices VIVIANO, BERNSTEIN, and CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

The Legislature has the authority to preempt school districts from adopting policies like the ones at issue that regulate firearms on school property; however, not only has the Legislature not done so, it has expressed its intent not to preempt such regulation. Because an unambiguous statute showed a legislative intent not to occupy the field of firearms regulation, the districts' policies were not impliedly field-preempted. And given the procedural history of the case and the arguments presented to the Court, it was unnecessary to determine whether the policies were conflict-preempted. The Court of Appeals judgments were affirmed. To the extent that *Mich Coalition for Responsible Gun Owners v City of Ferndale*, 256 Mich App 401 (2003), cited MCL 123.1102 as supporting the proposition that state law completely occupied the field of firearms regulation, it was overruled.

1. Under *Llewellyn*, a court begins the preemption analysis by determining whether state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive. It was undisputed in these cases that state law does not expressly preempt school districts' authority to regulate guns. While MCL 123.1102 prohibits a local unit of government from regulating firearms except as otherwise provided by federal law or a law of this state, MCL 123.1101(b) then defines "local unit of government" to mean "a city, village, township, or county." In other words, while MCL 123.1102 expressly preempts regulation of firearms by a city, village, township, or county, it does not apply to school districts.

2. In determining under *Llewellyn* whether the Legislature has impliedly occupied the field and thereby precluded local regulation in a certain area, courts are to consider legislative history, the pervasiveness of a state regulatory scheme, and whether the nature of the regulated subject matter demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. The Court of Appeals analyzed these factors and determined that the Legislature had not impliedly occupied the field of firearms regulation. However, this analysis of the *Llewellyn* factors to consider field preemption was unnecessary in light of the fact that an unambiguous statute established legislative intent to regulate the subject matter only partially. Under the doctrine *expressio unius est*

exclusio alterius—the expression of one thing suggests the exclusion of all others—the enactment of an express preemption statute limited to specific local units of government implies that entities not included are not preempted. In this case, because MCL 123.1102 and MCL 123.1101 exclude school districts from an otherwise precise list of local units of government prohibited from regulating firearms, the districts' policies are not field-preempted. To the extent that *Mich Coalition for Responsible Gun Owners*, 256 Mich App 401, cited MCL 123.1102 as supporting the proposition that state law completely occupied the field of firearms regulation, it was overruled.

3. Plaintiffs' argument that the districts' policies conflict with various statutes—particularly MCL 28.425o and MCL 750.237a, which they read as implying a state law right to openly carry firearms on school property—was abandoned because plaintiffs failed to assert it in their applications for leave to appeal and also made clear at oral argument that they were not advancing a conflict-preemption argument.

Court of Appeals judgments affirmed.

Justice VIVIANO, joined by Justice BERNSTEIN, concurring, wrote separately to explain his reasons for disagreeing with the dissenting opinion. He noted that the dissent raised only a narrow issue, specifically, whether the school policies directly conflicted with state law and were therefore preempted by it. He disagreed with the dissent's position that MCL 750.237a(5)(c) and MCL 28.425o(1)(a), when read together, give concealed pistol license (CPL) holders the right to openly carry a firearm on school property, thereby permitting what the policies prohibit. He stated that MCL 28.421 *et seq*. only addresses the open carrying of a pistol in limited circumstances not applicable in this case, MCL 28.425c(3)(b), and that MCL 750.237a also does not provide an express right to openly carry a firearm on school property. He further stated that even if these statutes could be read as expressly exempting the open carrying of firearms by CPL holders from the criminal prohibition in MCL 750.237a, the Court had previously rejected the dissent's theory that that which the Legislature has not prohibited it has impliedly permitted. Instead, the Court had established that in order for a state law to conflict with and preempt a local regulation, the state law must expressly permit something the local regulation prohibits. Justice VIVIANO concluded that because no state statute could be read to expressly permit the open carrying of firearms on school property, the school policies at issue did not conflict with any state law and were therefore not preempted.

Justice CLEMENT, concurring, wrote separately to note that, despite the number of opinions in these cases, no member of the Court expressed any disagreement as to the holding that the field of firearms regulation was not preempted either expressly, by MCL 123.1102, or impliedly under *Llewellyn*. She stated that what divided the Court was the Chief Justice's assertion that it was necessary to perform a threshold inquiry of whether the school districts had the authority to adopt the policies in the first place and his conclusion that they did not have this authority. Justice CLEMENT expressed no opinion on the merits of this argument but rather agreed with the majority that the Court should decline to advance this argument for the parties when the parties not only did not make it for themselves but instead ceded the issue during oral argument, thereby abandoning it. She stated that declining to reach this argument was consistent with the Court's concern for judicial modesty and the admonition that appellate courts do not sit as self-directed boards of legal inquiry and research, and she noted that declining to reach the argument in these cases did nothing to prejudice the Court's ability to take it up in a future case in which it was properly presented.

Justice WILDER, joined by Justice ZAHRA, concurred with the majority opinion insofar as it concluded that the Legislature has not occupied the entire field of firearm regulation for preemption purposes, but he respectfully dissented from the majority's decision not to reach the issue of conflict preemption, noting that the decision not to address an abandoned issue was a prudential matter rather than an inflexible rule and that the equities favored waiving the rules regarding issue preservation and abandonment under these circumstances. Justice WILDER would have granted the application in this case and directed the parties to brief the issue of conflict preemption in light of the fact that the issue presented a matter of pure statutory interpretation, the issue was likely to be relitigated, and the parties appeared motivated to brief and argue the issue of conflict preemption in greater depth.

Chief Justice MARKMAN, dissenting, stated that while he did not necessarily disagree with the majority's conclusions regarding express preemption and field preemption, he disagreed with the majority's failure to address the threshold inquiry of whether the school districts had the authority to adopt these policies in the first place. He stated that although MCL 380.11a(3) gives school districts the authority to enact policies that provide for the safety and welfare of pupils while at school "except as otherwise provided by law," state law *does* "otherwise provide," by generally

prohibiting the possession of firearms on school property in MCL 750.237a(4) but then by expressly exempting individuals licensed by this state to carry a concealed pistol from this prohibition in MCL 750.237a(5), thereby permitting licensed individuals to possess firearms on school property. He concluded that because the school districts have attempted to prohibit what state law permits, the school districts' policies are void. He stated that when there is an enactment of the Legislature that provides that a person "may" do something and a subordinate public body provides that he or she "may not" do that same thing, there is a textual, a logical, a legal, and a practical conflict, and the former provision of law prevails. Chief Justice MARKMAN would have reversed the judgment of the Court of Appeals in both cases.

1. WEAPONS — STATUTES — REGULATION OF FIREARMS — SCHOOLS — PREEMPTION.

A school district is not expressly preempted by state law from adopting policies that regulate firearms on school property; while MCL 123.1102 prohibits local units of government from regulating firearms except as otherwise provided by federal law or a law of this state, school districts are not local units of government for purposes of this provision (MCL 123.1101(b)).

2. STATUTES — PREEMPTION — FIELD PREEMPTION.

In determining whether the Legislature has impliedly occupied a field with respect to a subject and thereby precluded local regulation in that area, courts are to consider legislative history, the pervasiveness of the state regulatory scheme, and whether the nature of the regulated subject matter demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest; it is unnecessary for a court to consider whether the Legislature has impliedly preempted a given field if an unambiguous statute established legislative intent to regulate the subject matter only partially.

Makowski Legal Group, PLC (by *James J. Makowski*) for plaintiffs in Docket No. 155196.

Collins & Blaha, PC (by *William J. Blaha* and *Julia M. Melkić*) for defendants in Docket No. 155196.

Dean G. Greenblatt, PLC (by *Dean G. Greenblatt*) for plaintiffs in Docket No. 155204.

Giarmarco, Mullins & Horton, PC (by *Timothy J. Mullins*) for defendants in Docket No. 155204.

Amici Curiae:

Joel Gerring for the Michigan Association of School Boards.

Shifman & Carlson, PC (by *Robert J. Gavin* and *Sean P. Murphy*) for Life Skills Center of Pontiac and edtec central, LLC.

White Schneider PC (by *Jeffrey S. Donahue* and *John A. Maise*) for the Michigan Education Association and the Michigan Parent Teacher Association.

Stephen K. Postema for the city of Ann Arbor.

Ferguson Widmayer PC (by *Mark A. Hopper*) and *White & Case LLP* (by *Paul B. Carberry*) for the Brady Center to Prevent Gun Violence.

The Law Offices of Steven W. Dulan, PLC (by *Steven W. Dulan*) for the Michigan Coalition for Responsible Gun Owners.

Jacobs and Diemer, PC (by *John P. Jacobs*) for the Negligence Section of the State Bar of Michigan.

Julian Davis Mortenson for Engage 18.

MCCORMACK, J. The defendants, the Ann Arbor and Clio school districts, each have a policy banning firearms on school property. The plaintiffs, advocacy organizations supporting gun ownership and certain parents of children who attend school in the defendant districts, believe state law preempts these policies by implication. While the Legislature plainly can preempt school districts from adopting policies like the ones at

issue if it chooses to, it has not done so here: not only has our Legislature not preempted school districts' regulation of guns by implication, it has expressed its intent not to preempt such regulation. We therefore affirm the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

The defendant school districts adopted policies prohibiting firearms on school property. Each policy contains an exception for individuals with a concealed pistol license (CPL). To be clear, in practice this means CPL holders can carry a concealed weapon on school property under certain limited conditions, but they cannot openly carry one.[1]

The plaintiffs filed these lawsuits, seeking a determination that state law preempts by implication the school districts' policies limiting firearms on school grounds. Each district moved for summary disposition. The plaintiffs filed cross-motions for summary disposition or for declaratory relief.

In the Ann Arbor case, the Washtenaw Circuit Court granted the defendants' motion for summary disposition and denied the plaintiffs' motion for summary disposition. In the Clio case, the Genesee Circuit Court denied the defendants' motion for summary disposition and granted declaratory relief to the plaintiffs. In published opinions issued the same day and by the same panel, the Court of Appeals affirmed the Washtenaw Circuit Court and reversed the Genesee Circuit Court. The Court of Appeals held that the districts' policies are not field-preempted, applying the analysis from our decision

[1] The exception to the districts' policies for concealed carry under those limited conditions is to ensure alignment with state law, specifically MCL 28.425o.

in *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977), and that the policies are not conflict-preempted because they do not conflict with any statute.

The plaintiffs appealed, arguing that the school districts are prohibited from adopting policies banning firearms (beyond those permitted by the concealed-weapon licensing exception) because the state has occupied the field of firearms regulation and that the Court of Appeals' decisions in these cases conflict with its opinion in *Capital Area Dist Library v Mich Open Carry, Inc*, 298 Mich App 220; 826 NW2d 736 (2012) (*CADL*). We directed oral argument on the application in each case and ordered that they be argued and submitted together and directed the parties to brief:

> (1) whether, in light of MCL 123.1102, it is necessary to consider the factors set forth in *People v Llewellyn*, 401 Mich 314 (1977), in order to determine whether the school district's policies are preempted; (2) if so, whether the Court of Appeals properly analyzed the *Llewellyn* factors; and (3) whether the Court of Appeals correctly held that the school district's policies are not preempted. [*Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 501 Mich 941 (2017).]

II. ANALYSIS

Whether the state has preempted a local regulation, which the state can do expressly or by implication—and in that latter case either because the local regulation directly conflicts with state law or because the state has occupied the entire field of regulation in a certain area—is a question of statutory interpretation that we review de novo. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008); *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014). That means that we review it independently, with no required deference to the trial court. *Millar v Constr Code Auth*, 501 Mich 233, 237; 912 NW2d 521 (2018).

The plaintiffs argue that the school districts' policies are preempted by implication. For good reason: There is no indication that any statute preempts the policies expressly. Accordingly, the sole argument in the plaintiffs' applications for leave to appeal in this Court, and their primary argument in their supplemental briefing, is that the districts' policies are field-preempted under our decision in *Llewellyn*. Field preemption applies if "the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." *Llewellyn*, 401 Mich at 322. Conflict preemption, by contrast, applies instead if "the ordinance is in direct conflict with the state statutory scheme," *id*., such that conformity with both is not possible. The plaintiffs did not advance a conflict-preemption argument in their applications or at oral argument.

A. EXPRESS PREEMPTION

Under *Llewellyn*, a court begins the preemption analysis by determining whether state law "expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive . . . ." *Id*. at 323. As noted, there is no dispute that state law does not expressly preempt school districts' authority to regulate guns. Under MCL 123.1102, "[a] local unit of government shall not . . . enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols [or] other firearms . . . except as otherwise provided by federal law or a law of this state." MCL 123.1101(b) then defines "local unit of government" in the act to

mean "a city, village, township, or county." In other words, while MCL 123.1102 expressly preempts regulation of firearms by a city, village, township, or county, it does not apply to school districts, which are left out of the Legislature's list.[2]

B. IMPLIED PREEMPTION

1. FIELD PREEMPTION

The school districts' policies are also not impliedly field-preempted. Courts are to consider these factors in determining whether the Legislature has impliedly occupied the field so as to preclude local regulation in a certain area:

> [P]reemption of a field of regulation may be implied upon an examination of legislative history. *Walsh v River Rouge*, 385 Mich 623; 189 NW2d 318 (1971).

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[2] To the extent that the plaintiffs suggest that the Legislature made a mistake in omitting school districts from MCL 123.1101 and that allowing a school district (but not a statutorily defined local unit of government) to impose firearm restrictions would lead to absurd results and defeat the stated intent of the Legislature, we note that when statutory language is unambiguous, the Court presumes that the Legislature "intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). And we see nothing absurd in the Legislature choosing to allow local school districts to make decisions that best suit their localities, leaving the door open to local prohibitions of firearms in schools in particular. Schools are distinct in many ways. What is more, what's good policy for Ann Arbor and Clio might not be good policy for Cadillac and Escanaba. We see nothing absurd about letting each school district, through its elected representatives, determine its own policy. And the plaintiffs' argument that the Legislature simply made a mistake is also not compelling given that the Legislature has shown that it is perfectly capable of defining "local unit of government" broadly and including school districts when it wants to do so. See, e.g., MCL 15.501(d).

> [T]he pervasiveness of the state regulatory scheme may support a finding of preemption. *Grand Haven v Grocer's Cooperative Dairy Co*, 330 Mich 694, 702; 48 NW2d 362 (1951); *In re Lane*, 58 Cal 2d 99; 22 Cal Rptr 857; 372 P2d 897 (1962); *Montgomery County Council v Montgomery Ass'n, Inc*, 274 Md 52; 325 A2d 112, 333 A2d 596 (1975). While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.
>
> [T]he nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. [*Llewellyn*, 401 Mich at 323-324.]

The Court of Appeals analyzed these factors and determined that the policies were not field-preempted. But the school districts believe this step isn't needed. They contend that we should consider the exclusion of school districts from MCL 123.1101(b) as a definitive expression of the Legislature's intent *not* to occupy the field. They cite Judge GLEICHER's partial dissenting opinion in *CADL*, 298 Mich App at 241-251 (advocating this approach). We agree.

In *Llewellyn*, no statute expressly stated the Legislature's intent to preempt local obscenity regulation, but we found that the state's comprehensive coverage of the field impliedly revealed the Legislature's intent to occupy the field. *Llewellyn* therefore addressed a different question than the one presented here. Here, an unambiguous statute shows a legislative intent *not* to occupy the field.

Requiring courts to turn to the *Llewellyn* factors to consider *field* preemption even when an unambiguous statute establishes legislative intent to regulate the subject matter only partially would be an internally contradictory exercise and contrary to this Court's

general rules of statutory interpretation.[3] The Legislature's *partial* list of local units of government that may not regulate firearms answers, definitively, the field-preemption question. "Where the language of the statute is unambiguous, the plain meaning reflects the Legislature's intent and this Court applies the statute as written. . . . Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to determine legislative intent." *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999).[4] These principles apply with equal force to preemption questions. *Morales v Trans World Airlines, Inc*, 504 US 374, 383; 112 S Ct 2031; 119 L Ed 2d 157 (1992) ("The question [of preemption], at bottom, is one of statutory intent, and we accordingly ' "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." ' ") (citations omitted).

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[3] While of course not binding on this Court, the Court of Appeals has also held that resort to the remaining *Llewellyn* factors is unnecessary when a statute shows the Legislature's intent *not* to occupy the field. See, e.g., *Gmoser's Septic Serv, LLC v East Bay Charter Twp*, 299 Mich App 504, 513; 831 NW2d 881 (2013) (concluding that although the *Llewellyn* factors favored a finding that the Legislature preempted the field, "this is not a typical case" because the Legislature by statute had "specifically limited the preemptive effect of its statutory scheme" and finding no field preemption); *Granger Land Dev Co v Clinton Co Bd of Zoning Appeals*, 135 Mich App 154, 159; 351 NW2d 908 (1984) ("Where a statute contains a provision for limited pre-emption (as in the present case), a court may not imply total pre-emption from the statutory history, the pervasiveness of the regulatory scheme, or the need for uniformity arising from the nature of the regulated subject matter. Section 30(4) provides for limited pre-emption; it also implicitly precludes a holding of total pre-emption.").

[4] See also *CADL*, 298 Mich App at 251 n 5 (GLEICHER, J., dissenting) (stating that "[w]hen a statute explicitly defines the field of its reach, use of the *implied* field-preemption doctrine described in *Llewellyn* violates the canons of statutory construction and any application of *Llewellyn* is unjustified").

A reasonable application of the *expressio unius est exclusio alterius* doctrine gets to the same answer: " 'the expression of one thing suggests the exclusion of all others.' " *People v Wilson*, 500 Mich 521, 526; 902 NW2d 378 (2017). Enactment of an express-preemption statute limited to specific local units of government implies that entities not included are not preempted. *Cipollone v Liggett Group, Inc*, 505 US 504, 517; 112 S Ct 2608; 120 L Ed 2d 407 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."); *id*. at 547 (Scalia, J., concurring in part and dissenting in part) ("Once there is an express pre-emption provision, in other words, all doctrines of implied pre-emption are eliminated. . . . The existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines.").

Thus, when a statute expressly states the Legislature's desire to preempt or not preempt a field, the statute controls and resort to the remaining *Llewellyn* factors is unnecessary. In this case, because MCL 123.1102 and MCL 123.1101 show the Legislature's intent to preempt some local units of government from regulation but not others, that intent controls.[5] Because those statutes exclude school districts from an otherwise precise list of local units of government prohibited from regulating firearms, the districts' policies are not field-preempted. To the extent that

[5] We therefore need not reach the question whether the Court of Appeals in *CADL* or this case properly analyzed the remaining *Llewellyn* factors or whether those decisions are inconsistent in their analysis of those factors. Nor need we address the holding in *CADL* that MCL 123.1102 preempted the library's policy in that case because two entities covered by the statute created the district library that promulgated the policy.

Mich Coalition for Responsible Gun Owners v City of Ferndale, 256 Mich App 401, 414; 662 NW2d 864 (2003), cited MCL 123.1102 as supporting the proposition that "state law completely occupies the field of [firearms] regulation," we overrule it.

2. IMPLIED CONFLICT PREEMPTION[6]

In a secondary argument advanced only in their supplemental briefs, the plaintiffs and their supporting amicus contend that the districts' policies conflict with various statutes, particularly MCL 28.425o and MCL 750.237a, which they read as implying a state-law right to openly carry firearms on school property.[7] We decline to reach this argument because we conclude

[6] The dissent reframes this argument as a "threshold" issue of whether the school districts have the authority to adopt the policies at issue in the first place. But there is no such animal as "threshold preemption"—under the dissent's analysis, the districts lack that authority only if *their policies conflict with state law*, i.e., if they are conflict-preempted. And field preemption precludes *all* local regulation of a subject matter, while conflict preemption only precludes local regulation to the extent it conflicts with state law. Thus, it is difficult to understand the basis for the dissent's conclusion that its analysis involves "a question that must be addressed by the courts *before* the issue of field preemption can even be considered." See, e.g., *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 256-263; 566 NW2d 514 (1997) (resolving first whether a local ordinance was field-preempted before analyzing whether it was conflict-preempted by a state statute). In other words, this Court's typical analysis of such issues proceeds exactly as we have done here. It is therefore telling that however "logical" the dissent calls its order-of-operations approach, *it has no basis in our law*. And as correctly framed, the urgency of the dissent's plea that we must reach the conflict-preemption issue notwithstanding plaintiffs' abandonment of it loses much of its force.

[7] This argument is perfunctory and interwoven with the plaintiffs' argument that the districts' policies are field-preempted. See, e.g., Michigan Gun Owners' Supplemental Brief at 17 (asserting that Ann Arbor's policy is "expressly and impliedly preempted by Michigan firearms regulations" just after citing the *Llewellyn* test for field preemption and as part of its discussion of the first *Llewellyn* factor).

that the plaintiffs abandoned it by failing to assert it in their applications for leave to appeal. Michigan Gun Owners' Application for Leave to Appeal, p 7 (stating the sole question presented as "whether a school district is impliedly/field preempted from promulgating firearm rules or regulations"); Michigan Open Carry's Application for Leave to Appeal, p vi (same); Michigan Gun Owners' Application, p 20 (asserting that "[a]ppellants acknowledge that the [Ann Arbor Public Schools] policy does not directly contradict with the state statutory scheme"); Michigan Open Carry's Application, p 12 (stating that "Michigan Open Carry, Inc. does not claim that the school's firearm regulation is statutorily preempted"). See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (stating that "[f]ailure to brief a question on appeal is tantamount to abandoning it").

And the plaintiffs were perfectly clear at oral argument that they were not advancing a conflict-preemption argument. When asked to elaborate on this separate preemption theory, counsel for both of the plaintiffs balked except to offer a belated attempt to brief the issue.[8] "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is,

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[8] See Michigan Supreme Court, Oral Arguments in *Mich Gun Owners, Inc v Ann Arbor Pub Sch* <https://www.youtube.com/watch?v=rvGL1daiFGQ> at 6:12 to 6:29 (accessed July 10, 2018):

> *Justice* MCCORMACK: But that's a—that's a different kind of preemption, that's conflict preemption, not field preemption.
>
> *Mr. Makowski*: Right. *And we've not briefed that issue*. If the Court would like me to brief the issue of conflict preemption, I certainly can as a supplement.
>
> *Justice* MCCORMACK: Well that—I mean, is it an issue you've raised and pleaded throughout your litigation?
>
> *Mr. Makowski*: I have not. [Emphasis added.]

we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v United States*, 554 US 237, 243; 128 S Ct 2559; 171 L Ed 2d 399 (2008). The plaintiffs decided not to present this issue, and so we decline to reach it.[9]

Indeed, if anything, the plaintiffs *specifically disclaimed* such an argument even when presented with the opportunity to embrace it. See *id*. at 5:15 to 5:29; see also Michigan Supreme Court, Oral Arguments in *Mich Open Carry, Inc v Clio Area Sch Dist* <https://www.youtube.com/watch?v=ln1bsBx2F8A> at 14:36 to 14:49 (accessed July 10, 2018).

[9] Perhaps if the plaintiffs had articulated the dissent's theory, we would have found it appropriate to resolve it. But they didn't. (Maybe they didn't for the reasons in Justice VIVIANO's concurring opinion.) And whatever the propriety of the Court's decision in *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002), to resolve that case on an issue not raised in the defendant's briefing, at least it was raised at oral argument and not expressly disclaimed. That significantly distinguishes this case from *Mack* and exposes the dissent's judicial overreach: The dissent is ready to say point, game, match for the plaintiffs on an argument almost entirely of its own construction. There are plenty of considerations counseling against the dissent's position that it is "of no consequence" that the plaintiffs have not made the dissent's argument. If it is truly "of no consequence," best we ditch the adversarial system of law today, as under the dissent's approach we the Court will always know not only the better answer than any supplied by the parties but even the better questions than those asked by the parties.

Finally, the opinion concurring in part and dissenting in part would grant leave to appeal and direct the parties to brief this issue. It is difficult to take that suggestion very seriously. The concurrence/dissent wants to have it both ways: we should grant leave because these cases "present an important set of legal issues" while purporting to "take rules regarding issue preservation and abandonment very seriously . . . ." If *ever* we "take rules regarding issue preservation and abandonment very seriously," it should be here. Granting leave to appeal under the circumstances presented would send a message that we should and do decline to send: Abandon an issue in your application for leave to appeal? And definitively distance yourself from that legal theory at oral argument? Worry not! The Court will revive the theory for you and give you free rein to try again after hearing oral argument on that application.

III. CONCLUSION

These are straightforward cases. The Legislature has, expressly, restricted some but not all local governments from regulating firearms. Schools in particular are not on the preempted list, quite possibly for reasons not difficult to imagine. In any case, the clarity of the statute that we are bound to respect is entirely inconsistent with the notion that the Legislature plainly intended to occupy the field here. Of course, if the Legislature in its wisdom sees fit to allow open firearms on all school grounds, no matter what local school districts may variously desire, it can say so.

VIVIANO, BERNSTEIN, and CLEMENT, JJ., concurred with MCCORMACK, J.

VIVIANO, J. (*concurring*). I concur fully in the majority opinion. I write, however, to explain why I disagree with the dissent, which concludes that the defendant schools lacked authority to issue the policies here because of a purported conflict with state law. The dissent's reasoning is flawed—its conclusion is premised on a misreading of our statutes and a misunderstanding of our conflict-preemption doctrine.[1]

Before addressing the precise issue at the heart of the dissent's analysis, it is well to remember what this case is *not* about. No party has raised a constitutional challenge to the school policies at issue. And no justice believes that the Legislature has expressly preempted the school districts' policies or impliedly occupied the

[1] I agree with the majority's decision not to reach this issue, since the parties chose not to pursue this theory in our Court even when given the opportunity to do so. I write simply to point out some of the inherent flaws in the dissent's reasoning, and also to explain why I disagree with the partial concurrence that we should grant leave to address the issue.

field of firearms regulation.[2] The issue raised by the dissent is a narrow one: whether the school policies directly conflict with a state law and are therefore preempted by it.

In order for a state law to conflict with and preempt a local regulation, the state law must *expressly* permit something the local regulation prohibits:

> It has been held that in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test is *whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits.* Accordingly, it has often been held that a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required, or authorize what the legislature has expressly forbidden.
>
> * * *
>
> The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two . . . both will stand. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provi-

[2] Indeed, the majority and concurring justices hold to the contrary, and the dissenting justice states that he "do[es] not necessarily disagree with" this conclusion.

> sions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.[3]

Our caselaw thus stands for the proposition that "what the State law *expressly* permits an ordinance may not prohibit."[4]

The dissent posits that two statutory provisions, MCL 750.237a(5)(c) and MCL 28.425o(1)(a), when read together, give concealed pistol license (CPL) holders the right to openly carry a firearm on school property. Because a school's power to provide for the safety of its students is subject to state law,[5] including these provisions, the dissent concludes that the schools have no authority to ban the open carrying of firearms by CPL holders. Under this reasoning, state law permits what the policies prohibit, and thus it preempts those policies.

The dissent misreads our statutes. In order to determine what rights a person has by virtue of holding a CPL, the appropriate place to begin our analysis is the act that was intended to, among other things, "prescribe the rights and responsibilities of individuals who have obtained a license to carry a concealed pistol." MCL 28.421a. A few sections later, in MCL 28.425c(3), the Legislature describes the conduct authorized by a CPL, stating as follows:

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[3] *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 262; 566 NW2d 514 (1997) (emphasis altered), quoting 56 Am Jur 2d, Municipal Corporations, § 374, pp 408-409; see also *Detroit v Qualls*, 434 Mich 340, 362; 454 NW2d 374 (1990); *Miller v Fabius Twp Bd*, 366 Mich 250, 256-257; 114 NW2d 205 (1962).

[4] *Miller*, 366 Mich at 258, citing *City of Howell v Kaal*, 341 Mich 585, 590-591; 67 NW2d 704 (1954).

[5] MCL 380.11a(3)(b) (permitting the schools to regulate for the safety of pupils "except as otherwise provided by law").

> Subject to [MCL 28.425o] and except as otherwise provided by law, a license to carry a concealed pistol issued by the county clerk authorizes the licensee to do all of the following:
>
> (a) Carry a pistol concealed on or about his or her person anywhere in this state.
>
> (b) Carry a pistol in a vehicle, whether concealed or not concealed, anywhere in this state.

This provision, by itself, opens a gaping hole in the dissent's theory that, by virtue of their status as licensees, CPL holders have the right to openly carry a firearm on school property. Leaving aside, for the moment, its limiting language, this section authorizes a CPL holder to carry a concealed pistol on or about her person anywhere in the state; but it only authorizes the open carrying of a pistol (i.e., "whether concealed or not concealed") if it is done in a vehicle. Under well-established interpretative principles, by expressly authorizing a licensee to openly carry a pistol in a vehicle, the statute cannot be read as authorizing a right to openly carry a pistol more broadly.[6]

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[6] See *Bradley v Saranac Community Schs Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997) ("This Court recognizes the maxim *expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things."). This is not to say, of course, that the statute *prohibits* the open carrying of pistols except as provided in MCL 28.425c(3)(b). Instead, my point is more modest—it is only that, for purposes of conflict-preemption analysis, this particular statutory provision cannot be read as expressing a lawful right for CPL holders to openly carry firearms anywhere in the state. Nor could I locate any other statute regulating the open carrying of a firearm in our state. This is not surprising, however, since the "vast majority of . . . [state] statutes deal with concealed carry; while open carry is sometimes permitted in these states, nearly all of the laws focus on the right to carry a concealed weapon." Note, *Open Carry For All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 Yale L J 1486, 1497 (2014). The focus on concealed carrying stems from the fact that concealed carrying was long viewed with greater suspicion than the open carrying of weapons and thus as being in more need of regulation; accordingly,

Not finding such a right in the place where one might expect it to be (at least, if one accepts the dissent's theory that the right to openly carry a firearm on school property is somehow connected to a person's status as a CPL holder), the dissent looks instead to the Michigan Penal Code as the source of a CPL holder's rights in this regard. In particular, the dissent places great emphasis on MCL 750.237a, which makes it a crime for a person to possess a weapon in a weapon-free school zone unless that person is a CPL holder.[7] However, despite the

courts have struck down open-carry bans on constitutional grounds. Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash U L Rev 1187, 1210 (2015) (noting that in the nineteenth century, "[a]lthough laws prohibiting open-carry were more often than not invalidated, concealed-carry bans were generally upheld against constitutional challenge under the Second Amendment or state-law analogues"); *Open Carry for All*, 123 Yale L J at 1500 ("[A] clear pattern emerges from [nineteenth-century caselaw in which] . . . states were allowed to ban the concealed carry of weapons but not their open carry. This was not an arbitrary choice—instead, the dichotomy between open and concealed carry underscored antebellum understandings of permissible self-defense and public safety.").

In any event, I certainly do not mean to suggest that our citizens only have a right to openly carry a firearm if a statute expressly authorizes them to do so. Instead, our citizens have broad rights to bear firearms that are protected by the Second Amendment. US Const, Am II; see also *Dist of Columbia v Heller*, 554 US 570, 610-614; 128 S Ct 2783; 171 L Ed 2d 637 (2008) (noting caselaw upholding a constitutional right to openly carry firearms). As the United States Supreme Court has recognized, however, those rights are subject to certain restrictions. See *Heller*, 554 US at 626 (recognizing a broad right to bear firearms while noting that the Court was not "cast[ing] doubt on longstanding prohibitions on the possession of firearms . . . in sensitive places such as schools and government buildings").

[7] The relevant subsections of MCL 750.237a state, in relevant part:

> (4) Except as provided in subsection (5), an individual who possesses a weapon in a weapon free school zone is guilty of a misdemeanor . . . .
>
> * * *

dissent's protestations, an express right to openly carry a firearm on school property cannot be found in this criminal statute, either.

MCL 750.237a must be read *in pari materia* with MCL 28.425o(1)(a),[8] which provides that, except in narrow circumstances, a CPL holder may not carry a concealed pistol on school property. By its terms, MCL 28.425o(1)(a) pertains only to CPL holders and provides limitations on where they may carry a concealed pistol unless an exemption applies.[9] Unlike MCL 28.425c, MCL 28.425o does not authorize any conduct and makes no reference to unconcealed or open carrying of pistols or any other type of weapon. Thus, it is rather unremarkable that MCL 28.425o does "not

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(5) Subsection (4) does not apply to any of the following:

* * *

(c) An individual licensed by this state or another state to carry a concealed weapon.

[8] See *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 652; 852 NW2d 865 (2014) (opinion by VIVIANO, J.) ("[I]n the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another."). Notably, MCL 28.425o(1)(a) makes explicit reference to MCL 750.237a. See MCL 28.425o(1)(a) ("As used in this section, 'school' and 'school property' mean those terms as defined in . . . MCL 750.237a.").

[9] MCL 28.425o provides, in pertinent part:

(1) Subject to subsection (5), an individual licensed under this act to carry a concealed pistol, or who is exempt from licensure under section 12a(h), shall not carry a concealed pistol on the premises of any of the following:

(a) A school or school property except that a parent or legal guardian of a student of the school is not precluded from carrying a concealed pistol while in a vehicle on school property, if he or she is dropping the student off at the school or picking up the student from the school.

prohibit[] [a CPL holder] from possessing an openly carried firearm on school property."[10] This omission can hardly be viewed as "expressly permitting" a CPL holder to carry a firearm on school property, for purposes of a conflict-preemption analysis.[11]

The most reasonable way to interpret these provisions is that the exemption from criminal liability in MCL 750.237a(5)(c) only applies to the extent that a CPL holder complies with MCL 28.425c(3) and MCL 28.425o(1)(a).[12] In other words, the exemption is subject to the statutes that govern CPL holders and does not extend to conduct not authorized by the CPL statutes, such as openly carrying firearms on school property. MCL 750.237a proscribes conduct—it does not provide any affirmative rights whatsoever to CPL holders or anyone else. And it certainly does not grant broader rights to a CPL holder than the CPL statutes themselves.[13]

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[10] *Post* at 731 (MARKMAN, C.J., dissenting) (emphasis omitted).

[11] At various points and in various ways, the dissent asserts that "if something is *explicitly* not prohibited, it is permitted." *Post* at 748. There is a sense in which this is true, although the dissent's resort to principles of logic is open to some question. See, e.g., Aldisert, *Logic For Lawyers: A Guide to Clear Legal Thinking* (South Bend: National Institute for Trial Advocacy, 1997), pp 158-163. But the sense in which it is *not* true is the sense that matters for purposes of a conflict-preemption analysis, and that analysis is dictated by our precedents, not by a middle-school primer.

[12] As noted above, the conduct authorized by MCL 28.425c(3) is expressly limited by MCL 28.425o. See MCL 28.425c(3).

[13] The dissent believes that the Legislature has "clearly and straightforwardly denied school districts the authority to prohibit CPL holders from openly carrying firearms on school property," *post* at 729, and indeed cannot even conceive of "how the Legislature could have communicated its intentions any more clearly," *post* at 742. One obvious way would be for the Legislature to add school districts to the list of local government entities covered by the express preemption statute, see MCL 123.1101 and MCL 123.1102, something it is already considering. See 2017 SB 586. Alternatively, the Legislature could pass a regulatory law that expressly permits the open carrying of a firearm on school property.

Even if, despite the foregoing, these statutes could somehow be read as expressly exempting the open carrying of firearms by CPL holders from the criminal prohibition in MCL 750.237a, the dissent's theory has already been rejected by our Court in *Detroit v Qualls*. In that case, we addressed a criminal statute that prohibited the storage of fireworks in certain places and amounts, but *expressly* exempted certain retailers from the limitations.[14] The municipality, however, promulgated an ordinance preventing all retailers from storing more than 100 pounds of fireworks.[15] In this Court, the dissent concluded that the statute, by exempting retailers from the storage limitations, permitted the defendant retailer to store fireworks in excess of the limitations—thus, the ordinance's imposition of a storage limitation was preempted and invalid.[16] The majority disagreed with the conclusion "that the state [statute] impliedly permits what it does not prohibit,"[17] or, put differently, we "reject[ed] the rationale . . . that that which the Legislature does not prohibit, it impliedly permits . . . ."[18] Instead, we found no conflict between the statute and the ordinance.[19] Thus, despite

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[14] *Qualls*, 434 Mich at 361; see also former MCL 750.243d ("The storage of fireworks at the site of a wholesaler, dealer, or jobber, except for a retailer who has goods on hand for sale to the public in a supervised display area, shall be as follows . . . ."), 1968 PA 358, as amended by 1980 PA 422; repealed by 2011 PA 256.

[15] *Qualls*, 434 Mich at 369 n 1 (LEVIN, J., dissenting) (" 'Retail sales. The storage of fireworks in a place of retail sales shall be limited to a gross weight of less than one hundred (100) pounds . . . .' "), quoting Detroit Municipal Code, § 19-3-70 (emphasis omitted).

[16] *Qualls*, 434 Mich at 376 (LEVIN, J., dissenting).

[17] *Id*. at 361 (opinion of the Court).

[18] *Id*. at 363-364.

[19] *Id*. at 364. The dissent does not know quite how to get around the holding in *Qualls*. It first tries to ignore *Qualls*. *Post* at 741 ("I am unaware of even a *single* case in Michigan that has ever held that a

an express exemption from criminal liability under a state statute, we found no conflict between that statute and a local ordinance prohibiting the exempted conduct.[20]

We also rejected the dissent's reasoning in *Miller v Fabius Twp*. In that case, a state statute banned boats pulling water-skiers during the period of "1 hour after sunset to 1 hour prior to sunrise."[21] A local ordinance went further than the statute, banning waterskiing from 4:00 p.m. until 10:00 a.m. the following day.[22] The

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municipality or other subdivision of the state can forbid what the Legislature has permitted (either expressly *or* by implication)."). Then, in a footnote, the dissent attempts to distinguish it with the bewildering assertion that since "this Court concluded that the Legislature did not permit the conduct in dispute," *Qualls* "thus does not stand for the proposition that a municipality can forbid what the Legislature has permitted." *Post* at 741 n 2. Of course, this Court concluded that the Legislature did not permit the conduct in dispute precisely because it rejected the dissent's major premise in this case, i.e., that an express exemption in a criminal statute is an implied grant of permission for an individual to engage in the exempted activity that is not subject to local regulation. *Qualls*, 434 Mich at 363-364 (opinion of the Court) ("Therefore, we reject the rationale employed by the dissent that that which the Legislature does not prohibit, it impliedly permits . . . ."). Finally, the dissent disparages *Qualls* and is apparently of the belief that it should be overruled. See *post* at 747 ("[T]he [*Qualls*] majority did not even quote, let alone analyze, the actual language of the statute. . . . In other words, in a case in which the heart of the issue was one of statutory interpretation, the majority failed to interpret the actual words of the statute in dispute."). I take no position on whether *Qualls* was correctly decided because no party has asked us to overrule it. Instead, at this juncture, I would simply treat it as a binding and controlling precedent of our Court.

[20] In the analogous context of federal preemption law, "[i]t is the rule that exceptions to broad prohibitory statutes generally have no preemptive effect. . . . The Supreme Court has reasoned that a finding of preemption in this context is not only 'inappropriate,' but 'illogical.' " *Malabed v North Slope Borough*, 335 F3d 864, 872 (CA 9, 2003), quoting *Exxon Corp v Governor of Maryland*, 437 US 117, 132; 98 S Ct 2207; 57 L Ed 2d 91 (1978).

[21] *Miller*, 366 Mich at 255 (quotation marks omitted).

[22] *Id*. at 252.

dissent, employing the same reasoning as the dissent here, read the statute to permit waterskiing during the hours that it was not prohibited, and thus believed the ordinance conflicted with the statute.[23] In rejecting the plaintiff's argument that the ordinance was void because it exceeded the powers granted by the act, we held that the dissent's position was "based on the erroneous assumption that the legislature, in making it unlawful to water ski from 1 hour after sundown to 1 hour before sunrise, was expressing a lawful right to water ski without regulation during the other hours of the day."[24] We could discern no such intent from our review of the statute, and consequently we concluded that the ordinance and the statute did not conflict.[25] In other words, the statute's failure to prohibit conduct did not mean that the conduct was expressly permitted for purposes of a conflict-preemption analysis.

The dissent relies on *Builders Ass'n v Detroit*[26] to suggest that our conflict-preemption jurisprudence is broader than it truly is. In that case, the Legislature had made it unlawful to conduct business on Sunday but had provided various express exceptions.[27] The ordinance also made the same conduct unlawful but did not allow any of the statutory exceptions.[28] Consequently, it sought to prohibit by criminal sanction what the Legislature had exempted from criminal sanction. We held that the statute and ordinance conflicted.[29] But that is not the case here. The school policies do not

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[23] *Id*. at 260 (SOURIS, J., dissenting).

[24] *Id*. at 259 (opinion of the Court).

[25] *Id*.

[26] *Builders Ass'n v Detroit*, 295 Mich 272; 294 NW 677 (1940).

[27] *Id*. at 275.

[28] *Id*. at 273-274.

[29] *Id*. at 276-277.

criminalize anything, and the Legislature has not expressly exempted open carrying on school property by CPL holders. In any event, we have more recently held that even express exemptions are not enough to create a conflict.[30]

The dissent also cites *Nat'l Amusement Co v Johnson* for support. In that case, the Legislature had enacted a statute regulating "endurance contests," making it unlawful to hold such contests " 'except in accordance with the provisions of this act.' "[31] A local ordinance purported to ban all such endurance contests.[32] We held that the ordinance was preempted.[33] The dissent reads this case to mean that "where the Legislature makes conduct unlawful unless certain conditions are satisfied, the Legislature has logically made the conduct lawful when those conditions *have* been satisfied."[34]

But the statutory scheme in *Nat'l Amusement* was materially different from the one at issue here. In *Nat'l Amusement*, the statute explicitly stated that it was " '[a]n act to regulate endurance contests,' " and it expressly provided that the contests could occur if certain conditions were met.[35] In other words, unlike the statutes in this case, the legislation in that case provided an affirmative right to engage in the conduct at issue and established the circumstances under which the conduct could be carried out. We called the legislation "regulatory, not prohibitory," and stated that "it would seem clear that the legislature intended

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[30] See *Qualls*, 434 Mich at 364, discussed above.

[31] *Nat'l Amusement Co v Johnson*, 270 Mich 613, 614-615; 259 NW 342 (1935), quoting 1933 PA 65.

[32] *Id*. at 614.

[33] *Id*. at 617.

[34] *Post* at 732.

[35] *Nat'l Amusement*, 270 Mich at 614-615, quoting 1933 PA 65.

to permit continuance of the amusement, subject to statutory conditions."[36] That is not the case here. No one would say that either of the statutes cited by the dissent is designed to provide a framework to enable the open carrying of firearms on school property. The CPL statute makes absolutely no provision for such conduct,[37] and the criminal statute is "prohibitory," proscribing conduct rather than enabling it; moreover, even if the criminal statute affirmatively permits some form of carrying by CPL holders, it is concealed carrying, not open carrying.[38] Because no statute can be read to expressly permit the open carrying of firearms on school property, the policies here do not "attempt[] to prohibit what [a] statute permits."[39]

In sum, there is no conflict between the school policies and the relevant statutes because those statutes do not address the open carrying of firearms, much less afford an express right to do so; and the policies merely bar individuals from carrying firearms on school property. Consequently, there is no conflict between the statutes and the policies.

BERNSTEIN, J., concurred with VIVIANO, J.

CLEMENT, J. (*concurring*). I concur in full with the majority opinion. I write separately, however, to note that there is more agreement on this Court than may be apparent from the multitude of opinions in these cases. The majority opinion I join holds that the field of firearms regulation is not expressly preempted by MCL 123.1102 and that the field is not impliedly

[36] *Id.* at 617.

[37] MCL 28.425c(3)(a); MCL 28.425o.

[38] MCL 750.237a.

[39] *Nat'l Amusement*, 270 Mich at 617; see also *Qualls*, 434 Mich at 364.

preempted under our test from *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977). The partial dissent concurs with the majority "insofar as it concludes that the Legislature has not occupied the entire field of firearm regulation for preemption purposes." And the Chief Justice, in dissent, "do[es] not necessarily disagree with either of these specific conclusions . . . ." Consequently, as to the Court's holding that the field of firearms regulation here is not preempted—either expressly, by MCL 123.1102, or impliedly under our *Llewellyn* test—*no* member of the Court has expressed any disagreement.

What actually divides the Court, then, is the Chief Justice's assertion that we must perform a "*threshold* inquiry of whether the school districts possessed the authority to adopt these policies in the first place"; in essence, that there is a *conflict* between the scope of the school districts' regulatory authority and the policies at issue. The Chief Justice concludes that school districts do not possess this authority. But he is the only member of the Court to express that opinion; the partial dissenters express no opinion on the matter, but would simply grant leave to appeal "so that we can further explore this important issue." I, too, express no opinion on the merits of the Chief Justice's argument in dissent; where I part ways with the remaining dissenting justices is that I agree with the majority that we should decline to advance this argument *for* the parties when they have not only not made it for themselves, but instead—in the words of the partial dissent—"improvidently ceded" this issue during oral argument. I agree with the majority that because plaintiffs expressly and unambiguously abandoned any argument that there is a conflict between the regulations at issue and the scope of the school districts' statutory authority, we should decline to reach

that argument now. I believe that this is consistent with our concern for "judicial modesty" recently articulated in *People v Arnold*, 502 Mich 438, 481; 918 NW2d 164 (2018), and the admonition that "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them," *Jefferson v Upton*, 560 US 284, 301; 130 S Ct 2217; 176 L Ed 2d 1032 (2010) (Scalia, J., dissenting) (quotation marks and citation omitted). Declining to reach an argument the parties themselves have not raised does nothing to prejudice our ability to take it up in the future, in a case in which the issue is properly presented.

WILDER, J. (*concurring in part and dissenting in part*). I concur with the majority opinion insofar as it concludes that the Legislature has not occupied the entire field of firearm regulation for preemption purposes. However, I respectfully dissent from the majority's decision not to reach the issue of conflict preemption. Even assuming arguendo that plaintiffs abandoned this claim,[1] I would grant full leave so that we can further explore this important issue.

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[1] It is very common, if not routine, for one or more members of this Court to inform counsel during oral argument that the outcome of the specific case being argued by counsel is less important to the Court than the next hundred cases raising related issues that will be governed by the outcome of this case. Because it is imperative that we, as the Court of last resort for Michigan, timely and clearly expound on the significant jurisprudential issues of our state, we should fully resolve this case, which presents issues of vital importance to the people. Notwithstanding counsel's exchange with Justice MCCORMACK during oral argument in which he improvidently ceded the conflict-preemption issue, the importance of the next hundred cases counsels that this Court should exercise its discretion to grant leave to appeal and direct the parties to specifically brief the conflict-preemption question.

Like issue preservation, abandonment has always presented a prudential concern, not an inflexible rule. See *Wortman v R L Coolsaet Constr Co*, 305 Mich 176, 179; 9 NW2d 50 (1943) ("The right to amend a declaration after all proofs have been taken is a matter that rests in the sound discretion of the court."); MCR 7.305(H)(4) ("*Unless otherwise ordered by the Court*, an appeal shall be limited to the issues raised in the application for leave to appeal.") (emphasis added); see also MCR 7.316(A)(3) (stating that the Supreme Court can permit the grounds of an appeal to be amended).[2] Thus, rather than flat-out refusing to rule on the issue of conflict preemption, this Court should weigh the extent to which the issue is necessary to a full and proper determination of the applicable law, see *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011), against the risk that the parties involved will not provide the sort of adversarial tenacity that this Court relies on to adjudicate matters effectively. Cf. *Castro v United States*, 540 US 375, 386; 124 S Ct 786; 157 L Ed 2d 778 (2003) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.") (Scalia, J., concurring in part).

In this case, prudence counsels in favor of granting leave on the issue of conflict preemption. Plaintiffs claim that they have a statutory right to carry firearms on school property under certain circumstances, while defendants seek to prevent that from happening. By

[2] This much is also clear from our recent practice. See, e.g., *People v Cowan*, 501 Mich 900 (2017) (remanding to the circuit court to conduct an evidentiary hearing into the defendant's claim of ineffective assistance of counsel despite the defendant's not clearly raising the issue below); *People v Temelkoski*, 498 Mich 942 (2015) (requesting that the parties address additional issues not initially raised in the application).

narrowly addressing only the issue of field preemption, the majority has not settled this statutory dispute. That is, in order to fully resolve the ultimate issue before us—whether state law preempts the respective school policies—it is necessary to determine whether those policies are in conflict with one or more statutes enacted by the Legislature. The majority has provided only partial guidance and left lingering doubts. A full grant with specific instructions to the parties that they address the issue of conflict preemption would resolve this uncertainty. There is also little chance that the parties will not give it their all if asked to brief and argue the issue of conflict preemption in greater depth. Having zealously advocated in the lower courts, both plaintiffs and defendants in these cases are clearly motivated to prevail.

Nor can I find any other concern counseling against a grant. There is no need for further factual development, because the issue of conflict preemption presents a matter of pure statutory interpretation. See *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010). In other words, it is a question of law firmly within our wheelhouse and ripe to resolve. Cf. *McNeil v Charlevoix Co*, 484 Mich 69, 81 n 8; 772 NW2d 18 (2009) (noting that preservation requirements can be ignored if the issue presents a purely legal question and no further fact-finding is necessary). We should not shy away from tackling it, even if it presents a difficult question.

The conflict-preemption issue presented by these cases is one that will surely be relitigated; it is just a question of when. While I take rules regarding issue preservation and abandonment very seriously, believing them to be essential to the functioning of our adversarial system, see *Greenlaw v United States*, 554

US 237, 243; 128 S Ct 2559; 171 L Ed 2d 399 (2008), on balance the equities favor waiving such requirements under these circumstances.

These cases present an important set of legal issues. And yet we have only heard them through arguments on the applications. In my view, that is insufficient. Accordingly, because I believe that this Court should grant the applications in these cases and direct the parties to brief the issue of conflict preemption, I respectfully dissent from the majority's decision to dismiss the issue as abandoned.

ZAHRA, J., concurred with WILDER, J.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's affirmance of the judgments of the Court of Appeals. The majority concludes that MCL 123.1102 does not expressly preempt the school districts' policies and that the school districts' policies are not field-preempted. While I do not necessarily disagree with either of these specific conclusions, I do disagree with the majority's failure to address the *threshold* inquiry of whether the school districts possessed the authority to adopt these policies in the first place. Because MCL 380.11a(3) provides that school districts have the authority to enact school policies "except as otherwise provided" and because MCL 750.237a "otherwise provide[s]," I respectfully dissent. MCL 750.237a permits individuals licensed by this state to carry a concealed pistol (CPL holders) to openly carry firearms on school property while the school policies at issue here prohibit such conduct. Because school districts do not possess the authority to adopt policies that conflict with state law and the policies at issue here clearly conflict with state law,

these policies are plainly invalid. Accordingly, I would reverse the judgments of the Court of Appeals.

NOTE TO THE READER

I do not raise any novel theories in this opinion. Instead, I rely on the clear language and logic of the laws at issue. The School Code provides that school districts have the authority to enact policies that "provid[e] for the safety and welfare of pupils while at school . . . except as otherwise provided by law . . . ." MCL 380.11a(3)(b). And state law does "otherwise provide": first, by generally prohibiting the possession of firearms on school property, MCL 750.237a(4), and, second, by then expressly *exempting* CPL holders from this prohibition, MCL 750.237a(5)(c). That is, the second of these provisions necessarily permits CPL holders to possess firearms on school property. Yet the school districts here have attempted to prohibit this. Because they attempt to prohibit what state law permits, their policies are void. It is that simple, and the opinion could end here. However, my position has not prevailed, and therefore I have written considerably more to explain my argument in greater detail and to respond to the majority and concurring opinions. But I do not want the reader to lose sight of the fact that my position is as direct and as uncomplicated as this note suggests.

ARGUMENT

The present issue, of course, is not whether CPL holders *ought* to be allowed to openly carry firearms on school property, but rather what is required by the *laws* of this state. Thus, it is the exercise of this Court's judgment, not its will, that is required. The Federalist No. 78 (Hamilton) (Rossiter ed, 1961), at 469. For the following reasons, I conclude that the representatives

of the people—those who serve in our Legislature—have clearly and straightforwardly denied school districts the authority to prohibit CPL holders from openly carrying firearms on school property, and this Court lacks the authority to second-guess the wisdom of that decision.

(1) "School districts, like townships and counties, are subdivisions of the State . . . ." *Van Wert v Sch Dist No 8*, 100 Mich 332, 333; 58 NW 1119 (1894). "[S]chool districts possess such power as the statutes expressly or by reasonably necessary implication grant to them." *Senghas v L'Anse Creuse Pub Sch*, 368 Mich 557, 560; 118 NW2d 975 (1962) (emphasis omitted).

(2) The Revised School Code, MCL 380.1 *et seq*., which is the only statute that defendants cite in support of their authority to enact the school policies at issue, provides, in pertinent part:

> A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to a power expressly stated in this act; and, *except as otherwise provided by law*, may exercise a power incidental or appropriate to the performance of a function related to operation of a public school and the provision of public education services in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following:
>
> * * *
>
> (b) Providing for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity. [MCL 380.11a(3) (emphasis added).]

Accordingly, general powers school districts, such as defendants, may enact policies "providing for the

safety and welfare of pupils while at school" "except as otherwise provided by law." *Id*.

(3) The school policies at issue purport to "provid[e] for the safety and welfare of pupils while at school" by prohibiting even CPL holders from openly carrying firearms on school property. However, the school districts' authority to enact such policies is limited by the "except as otherwise provided by law" language of the Revised School Code. Therefore, the issue is whether a CPL holder's right to openly carry firearms on school property is "otherwise provided by law," and I conclude that it clearly is.

(4) Specifically, it is "otherwise provided by law" by MCL 750.237a, which first states that "[e]xcept as provided in subsection (5), an individual who possesses a weapon in a weapon free school zone is guilty of a misdemeanor," MCL 750.237a(4), and then sets forth an exception in MCL 750.237a(5)(c) that "[s]ubsection (4) does not apply to . . . [a]n individual licensed by this state or another state to carry a concealed weapon." Thus, MCL 750.237a permits an individual licensed to carry a concealed weapon to possess a firearm on school property.

(5) However, MCL 28.425o(1)(a) states that "an individual licensed under this act to carry a concealed pistol . . . shall not carry a *concealed* pistol on the premises of . . . [a] school or school property except that a parent or legal guardian of a student of the school is not precluded from carrying a concealed pistol while in a vehicle on school property, if he or she is dropping the student off at the school or picking up the student from the school." (Emphasis added.) As a result, when MCL 750.237a and MCL 28.425o are read together, it is clear that while a CPL holder is generally prohibited from possessing a *concealed* pistol on school property, he or

she is not prohibited from possessing an *openly carried* firearm on school property. Indeed, a CPL license expressly states, "This license *allows* the licensee to carry a pistol on or about his person anywhere in state, except a licensee shall not carry a *concealed* pistol [on] . . . school property . . . ." (Emphasis added.) See also Michigan State Police, *Legal Update No. 86* (2010) <https://www.michigan.gov/documents/msp/MSP_Legal_Update_No._86_2_336854_7.pdf>, at 2-3 (accessed July 9, 2018) [https://perma.cc/5VLA-CUSR] ("[MCL 28.425o] applies to CPL holders carrying a *concealed* pistol. If the CPL holder is carrying a non-concealed pistol, the statute does not apply. . . . Therefore, a person with a valid CPL may carry a non-concealed pistol in the areas described in MCL 28.425o . . . .").

(6) Thus, MCL 750.237a(5)(c) permits the open carry of firearms on school property by CPL holders. Because the Legislature has permitted by statute the open carry of firearms on school property by CPL holders, school districts cannot enact policies that conflict with that statute. Such policies fall within the "except as otherwise provided by law" qualification of MCL 380.11a(3). This reasoning is straightforward and requires nothing more than a traditional construction of two legal provisions, MCL 380.11a(3) and MCL 750.237a.

(7) Moreover, this reasoning is also consistent with that in cases such as *Builders Ass'n v Detroit*, 295 Mich 272; 294 NW 677 (1940), in which this Court held that when a criminal statute creates an exception to a penalty, this logically permits an individual to engage in the conduct that is the subject of the exception. In that case, the Legislature prohibited certain activity (conducting business on Sunday), but provided an exception to that prohibition (for those who observed

the Sabbath on Saturday). A Detroit ordinance, however, prohibited even those who observed the Sabbath on Saturday from conducting real estate business on Sunday. This Court held that the ordinance "attempts to prohibit that which the statute *permits* and is, therefore, void." *Id*. at 276 (emphasis added).

(8) In MCL 750.237a, by the same token, the Legislature has carved out an express exception (open carry of firearms on school property by CPL holders) from an express prohibition (no firearms on school property). By doing so, the Legislature has permitted the open carry of firearms on school property by CPL holders while the school policies prohibit such activity. Thus, these policies "attempt[] to prohibit that which the statute permits and [are], therefore, void." *Builders Ass'n*, 295 Mich at 276.

(9) This reasoning is also consistent with that in cases such as *Nat'l Amusement Co v Johnson*, 270 Mich 613; 259 NW 342 (1935), in which this Court held that where the Legislature makes conduct unlawful unless certain conditions are satisfied, the Legislature has logically made the conduct lawful when those conditions *have* been satisfied. In that case, the Legislature made it unlawful to conduct walkathons unless certain conditions, such as physical examinations of the participants, were conducted. The Grand Rapids ordinance, however, made all walkathons unlawful. This Court held that the Grand Rapids ordinance "attempts to prohibit what the statute *permits*. . . . Therefore, the ordinance is void." *Id*. at 617 (emphasis added). See also *id*. ("[It is] clear that the legislature intended to permit continuance of [walkathons], subject to statutory conditions," because "[t]he statute makes it unlawful to conduct a walkathon only in violation of certain conditions" and "[t]his is merely a common

legislative manner of saying that it is *lawful* to conduct it if the regulations are observed.") (emphasis added).

(10) In MCL 750.237a, the Legislature has made it unlawful to openly carry firearms on school property unless certain conditions are satisfied, e.g., those set forth in MCL 750.237a(5)(c), namely, being "licensed by this state or another state to carry a concealed weapon." By doing so, the Legislature has permitted the open carry of firearms on school property by CPL holders. Yet, the school policies prohibit CPL holders from openly carrying firearms on school property. That is, the school policies "attempt[] to prohibit what the statute permits," and therefore, the school policies are void. *Nat'l Amusement Co*, 270 Mich at 617.

(11) That CPL holders are permitted to openly carry firearms on school property under MCL 750.237a(5)(c) is further reinforced by consideration of MCL 750.237a(5)(f). As with MCL 750.237a(5)(c), MCL 750.237a(5)(f) exempts certain conduct from the general prohibition of the possession of firearms on school property. Specifically, MCL 750.237a(5) provides:

> Subsection (4) does not apply to any of the following:
>
> * * *
>
> (c) An individual licensed by this state or another state to carry a concealed weapon.
>
> * * *
>
> (f) An individual who is 18 years of age or older who is not a student at the school and who possesses a firearm on school property while transporting a student to or from the school if any of the following apply:
>
> (*i*) The individual is carrying an antique firearm, completely unloaded, in a wrapper or container in the trunk of

> a vehicle while en route to or from a hunting or target shooting area or function involving the exhibition, demonstration or sale of antique firearms.

It is difficult to escape the conclusion that a person who engages in the conduct identified in MCL 750.237a(5)(f)(*i*), such as a parent who has an unloaded antique shotgun locked in the trunk and is picking up his or her child from school after an antique gun show, simply *cannot* be excluded from school property. The Legislature could not have been more clear in providing that such conduct is *permitted*. Indeed, an amicus brief filed in *support* of the school district by the Negligence Section of the State Bar of Michigan acknowledges that a school district cannot exclude from school property those who fall within this protection. However, if a school cannot exclude persons who fall within the protections of MCL 750.237a(5)(f), there are no conceivable grounds for excluding persons who fall within the protections of MCL 750.237a(5)(c). The first principle of statutory interpretation establishes that subsections (5)(a), (5)(b), (5)(c), (5)(d), (5)(e), and (5)(f) *each* set forth conduct protected by the Legislature that cannot be prohibited by school districts. If any *one* of these legislative exceptions, including (5)(c) (the CPL holders exception), can be nullified by schools, then any or all of the other exceptions can also be nullified.

(12) Furthermore, MCL 750.237a is more specific to the possession of weapons on school property by CPL holders than MCL 380.11a (or any other statute in the Revised School Code), so MCL 750.237a controls over MCL 380.11a for that reason as well. *Ligons v Crittenton Hosp*, 490 Mich 61, 83-84; 803 NW2d 271 (2011) ("These specific statutes governing medical malpractice actions, which apply to the more narrow realm

of circumstances, prevail over the more general rules applicable to all civil actions.") (quotation marks and citation omitted).

For these reasons, I believe that Michigan law clearly permits the open carry of firearms on school property by CPL holders and that school districts cannot enact policies that conflict with that law. This is because school districts can only enact security policies "*except as otherwise provided by law*," and MCL 750.237a(5)(c) "*otherwise provide*[*s*] *by law*." Therefore, I would reverse the judgments of the Court of Appeals.

RESPONSE TO MAJORITY

(1) The majority fails to address whether the school policies at issue here conflict with MCL 750.237a because this was a "secondary argument advanced only in [plaintiffs'] supplemental briefs[.]" Although plaintiffs may not have principally relied on this particular *argument* throughout these proceedings, *all* parties agree that the dispositive *issue* is whether the school district's policy is valid or void, i.e., whether schools can prohibit CPL holders from openly carrying firearms on school property. See, e.g., Michigan Gun Owners' Application for Leave to Appeal, p 10 ("On April 27, 2015 . . . Plaintiffs filed suit seeking a Declaratory Judgment in an effort to establish conclusively that the AAPS policy implementation was unlawful as it affects lawful firearm possession."); Michigan Open Carry's Application for Leave to Appeal, p 3 ("On March 5, MOC and Mr. Herman brought their suit in the Genesee County Circuit Court for declaratory relief in an effort to conclusively establish that the CASD policy was unlawful as it interferes with lawful firearm possession."); Ann Arbor Public Schools' Answer, p 4 ("The District's policies prohibiting the

possession of firearms on school property are permissible . . . because the District has the authority to enact such policies . . . ."); Clio Area Schools' Answer, p v ("Plaintiffs—open carry gun advocates—filed a lawsuit seeking a declaratory judgment that would allow them to openly carry guns in schools operated by the Clio Area School District.") See also, as an illustrative reportorial description of the case, Gershman, *Michigan High Court Takes Up School Gun Ban*, Wall Street Journal (April 11, 2018) <https://www.wsj.com/articles/michigan-high-court-takes-up-school-gun-ban-1523454482> (accessed July 9, 2018) [https://perma.cc/EXY3-F678] ("Michigan's highest court on Wednesday heard arguments on whether the right to openly carry firearms extends to school grounds.").

(2) Plaintiffs predominantly argue that the school districts' policies are void because they are preempted by state law via field preemption. I would instead hold that the school districts' policies are void because the districts do not have the authority to adopt a policy when a contrary policy is "otherwise provided by law," MCL 380.11a(3), and MCL 750.237a(5)(c) "otherwise provide[s] by law." In other words, plaintiffs argue in support of the right result but predominantly rely on the wrong reasoning. This Court frequently affirms lower court decisions on exactly that basis, that they have "reached the right result for the wrong reason." See, e.g., *People v Brownridge*, 459 Mich 456, 462; 591 NW2d 26 (1999). Similarly, nothing precludes this Court from concluding that although plaintiffs predominantly relied on the wrong reasons, they consistently argued in support of the right result. It is of no consequence that plaintiffs have not consistently argued in support of any particular reasoning. We resolve cases and controversies; we do not sit in judgment of the work of attorneys.

(3) Plaintiffs have cited and called to the attention of this Court and the lower courts the two statutes I view as dispositive: MCL 380.11a(3) and MCL 750.237a. Given that I conclude it is unnecessary to look beyond these statutes, this opinion does nothing out of the ordinary in relying upon these statutes and reaching the conclusion, exclusively on the basis of these statutes, that the school districts' policies are clearly void.

(4) Moreover, even *if* the issue articulated here had been unpreserved (and it was not; it was only the precise argument that was purportedly unpreserved), it is well established that "this Court may review an unpreserved issue if it is one of law and the facts necessary for resolution of the issue have been presented[.]" *McNeil v Charlevoix Co*, 484 Mich 69, 81 n 8; 772 NW2d 18 (2009). The question whether the school districts possess the authority to adopt the policies at issue "presents an issue of statutory interpretation, which is a question of law for which the facts necessary for its resolution are sufficiently present to permit this Court's review." *Id*. See also *People v Temelkoski*, 501 Mich 960 (2018), decided earlier this year on the basis of what was an entirely unpreserved argument.

(5) That is, even *if* the precise issue had been unpreserved (and once again it was only the precise argument that was purportedly unpreserved), "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when ' "necessary to a proper determination of a case . . . ." ' " *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (citations omitted). See also *People v Rao*, 491 Mich 271, 289 n 4; 815 NW2d 105 (2012) ("[W]hile an appellate court will not ordinarily review an issue that has been abandoned or waived, such review is allowed when it is 'necessary to

a proper determination of a case . . . .' ") (citation omitted); *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) ("[T]his Court has [the] inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice . . . ."). And here, consideration of the school districts' authority under the Revised School Code to adopt the policies in dispute is *indeed* "necessary to a proper determination" of this case. It is a serious "miscarriage of justice" for this Court to hold that the school districts' policies are valid and allow that opinion to inform the rights of nearly 600 school districts and more than 600,000 CPL holders throughout this state, as well as to have that opinion define the law for the 10 million people of Michigan, when the majority opinion does not even consider the dispositive statutes. Even more fundamentally, it is a serious "miscarriage of justice" to fail to consider a supposedly "unpreserved" argument when that argument implicates the *threshold* inquiry in this case: whether the school districts possess the authority under the Revised School Code to adopt their policies in the *first place*. It is a question that must be addressed by the courts *before* the issue of field preemption can even be considered.[1]

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[1] Contrary to the majority's assertion, whether a school district possesses the authority to adopt a particular policy *is* properly described as a "threshold" inquiry. If the district lacks such authority in the first place, there is no need to address further whether the state has or has not occupied the field of regulation in a particular realm. A district only possesses authority granted by statute, and in order to determine whether it possesses a particular authority, we must *first* look to the statute that purports to grant that authority, in this case the Revised School Code. If the authority is lacking, that is the end of the analysis. Yet, the majority concludes that the school district policies at issue are valid without any reference to the code. How can the majority possibly know whether these policies are valid without first assessing whether the code grants a district the authority to enact them? Because the code provides that a district may enact policies "providing for the safety and

(6) The decision of an individual litigant not to pursue an available line of argument, or even to relinquish an available issue, cannot impose on this Court an obligation to operate upon erroneous premises or to fail to take into account relevant statutes. MCL 380.11a(3) and MCL 750.237a have been called to the attention of this Court by the parties and they are controlling: the school districts have no authority to adopt the policies that have exclusively defined the present controversy at every stage of this litigation.

(7) Indeed, in *Mack v Detroit*, 467 Mich 186, 206-207; 649 NW2d 47 (2002), this Court was in a similar situation to the present one, and we correctly held that "[w]e absolutely oppose the dissenters' apparent position that although a controlling legal issue is squarely before this Court, in this case preemption by state law, the parties' failure or refusal to offer correct solutions to the issue limits this Court's ability to probe for and provide the correct solution." As we further explained, "addressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle" because "no one can seriously question the right of this Court to set forth the law as clearly as it can, irrespective of whether the parties assist the Court in fulfilling its constitutional function." *Id*. at 207, 209. "The jurisprudence of Michigan cannot be, and is not, dependent upon whether individual parties accurately identify and elucidate controlling legal questions." *Id*. at 209.

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welfare" of students "except as otherwise provided by law," MCL 380.11a(3), an altogether logical continuation of the "threshold" inquiry is whether there is any law that "otherwise provides." And this is where MCL 750.237a comes into play; it is exactly a law that "otherwise provides." Thus, the present inquiry does not constitute a "threshold" inquiry *only* if, as the majority has done, it is assumed *entirely without analysis* that school districts possess the legal authority to enact the policies in dispute in the first place.

RESPONSE TO JUSTICE VIVIANO'S CONCURRENCE

(1) The concurrence asserts that pursuant to the "conflict preemption" doctrine, "[i]n order for a state law to conflict with and preempt a local regulation, the state law must *expressly* permit something the local regulation prohibits." To begin with, the question at issue here is not exactly one of conflict preemption. Instead, the more precise question is whether the school districts' policies are void because they exceed the powers granted to school districts by the Revised School Code. It is a question of governmental authority. As discussed earlier, the Code provides that school districts may enact policies "[p]roviding for the safety and welfare of pupils while at school" "except as otherwise provided by law . . . ." MCL 380.11a(3)(b). The Revised School Code does not say "except as otherwise *expressly* provided by law," but simply "except as otherwise provided by law." Therefore, the precise question is whether there is state law that provides for something other than what the school districts' policies provide for whether state law and the school district policies are in conflict. As I have explained at length, they are in conflict and state law prevails.

(2) Furthermore, I am not at all convinced that "conflict preemption" somehow obligates state law to *expressly* permit what school district policies prohibit and why it is not enough that a reasonable reading of the law identifies a conflict. Nonetheless, it is well established that there are two types of preemption, express and implied, and there are two types of implied preemption, conflict and field. That is, conflict preemption is a form of *implied* preemption; indeed, even the majority refers to conflict preemption as "*implied* conflict preemption." Given this, it would be extremely odd

if *implied* conflict preemption somehow required an *express* conflict, and it does not.

(3) Moreover, although the concurrence is correct that there are cases that cite 56 Am Jur 2d, Municipal Corporations, § 374, p 408, as stating that "a municipality cannot lawfully forbid what the legislature has *expressly* licensed, authorized, permitted, or required" (emphasis added), I am unaware of even a *single* case in Michigan that has ever held that a municipality or other subdivision of the state can forbid what the Legislature has permitted (either expressly *or* by implication).[2] Instead, it is remarkably well established that " 'in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits.' " *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 262; 566 NW2d 514 (1997), despite quoting 56 Am Jur 2d, Municipal Corporations, § 374, p 408 (emphasis omitted); see also *Detroit v Qualls*, 434 Mich 340, 362; 454 NW2d 374 (1990); *Ter Beek v City of Wyoming*, 495 Mich 1, 20; 846 NW2d 531 (2014); *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977); *Walsh v River Rouge*, 385 Mich 623, 637; 189 NW2d 318 (1971); *Miller v Fabius Twp Bd*, 366 Mich 250, 256; 114 NW2d 205 (1962); *Grand Haven v Grocer's Coop Dairy Co*, 330 Mich 694, 698; 48 NW2d 362 (1951); *People v McDaniel*, 303 Mich 90, 93; 5 NW2d 667 (1942); *Builders Ass'n*, 295 Mich at 277; *Nat'l Amusement Co*, 270 Mich at 617.

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[2] The concurring justice might believe that *Qualls* stands for this proposition, but in that case, as discussed later, this Court concluded that the Legislature did not permit the conduct in dispute and thus does not stand for the proposition that a municipality can forbid what the Legislature has permitted.

(4) Furthermore, even *assuming* that an express conflict is required—a proposition nowhere evident in actual Michigan judicial decisions—there is an even clearer demonstration of a conflict in the instant case between the school districts' policies and MCL 750.237a(5)(c) than an express conflict: a *logical* conflict. As discussed earlier, MCL 750.237a(4) states, "Except as provided in subsection (5), an individual who possesses a weapon in a weapon free school zone is guilty of a misdemeanor," and MCL 750.237a(5)(c) states, "Subsection (4) does not apply to . . . [a]n individual licensed by this state or another state to carry a concealed weapon." In other words, as a general proposition, people cannot possess a firearm on school property; however, CPL holders are excepted from this prohibition. I really am not sure how the Legislature could have communicated its intentions any more clearly. Yet the school districts' policies here prohibit CPL holders from possessing firearms on school property. In other words, the school districts seek to prohibit what the state through MCL 750.237a(5)(c) permits.

(5) I agree with the concurrence to the extent that it asserts: (a) "MCL 750.237a must be read *in pari materia* with MCL 28.425o(1)(a)," (b) MCL 28.425o(1)(a) "provides that, except in narrow circumstances, a CPL holder may not carry a concealed pistol on school property," (c) MCL 28.425o "makes no reference to unconcealed or open carrying of pistols," and (d) "the exemption from criminal liability in MCL 750.237a(5)(c) only applies to the extent that a CPL holder complies with . . . MCL 28.425o(1)(a)." However, I disagree with what the concurrence apparently believes follows from these propositions, to wit, that MCL 750.237a(5)(c) does not permit a CPL holder to possess an openly carried firearm on school property. As discussed earlier, MCL 750.237a(5)(c) permits a CPL

holder to possess a firearm on school property, while MCL 28.425o(1)(a) prohibits a CPL holder from possessing a *concealed* firearm on school property. Reading these two statutes together in altogether conventional ways, it is clear that while a CPL holder cannot possess a *concealed* firearm on school property, he or she can possess an *openly carried* firearm on school property.[3] Contrary to the concurrence's implication, I do not rely upon the Legislature's silence in any way to justify this conclusion, but rather on the explicit language of MCL 750.237a(5)(c) and MCL 28.425o(1)(a).[4]

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[3] The concurrence asserts that MCL 28.425c(3) "opens a gaping hole in [my] theory . . . ." MCL 28.425c(3) provides *generally* that a CPL holder can "carry a pistol concealed on or about his or her person *anywhere* in this state" and can "carry a pistol in a *vehicle*, whether concealed or not concealed, *anywhere* in this state." (Emphasis added.) However, the issue in this case pertains *specifically* to the possession of firearms on *school* property; MCL 750.237a and MCL 28.425o(1)(a) pertain *specifically* to the possession of firearms on *school* property; and it is well established that "a specific statutory provision controls over a related but more general statutory provision," *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367 n 22; 817 NW2d 504 (2012)—hence my reliance on the two statutes that specifically pertain to the possession of firearms on *school* property rather than the more *general* statute that does not specifically pertain to the possession of firearms on school property and indeed notes that its general terms are "subject to" other provisions of the law, including explicitly MCL 28.425o. The concurrence concludes that "by expressly authorizing a licensee to openly carry a pistol in a vehicle, [MCL 28.425c(3)] cannot be read as authorizing a right to openly carry a pistol more broadly." I agree and that is exactly why I do not rely on MCL 28.425c(3) as authorizing such a right. Rather, I rely on MCL 750.237a(5)(c) as authorizing such a right, at least on school property, and, as recognized even by the concurrence, MCL 28.425c(3) does not "*prohibit*[] the open carrying of pistols . . . ."

[4] That is, I do *not* conclude that the Legislature, by failing to prohibit the open carrying of a firearm on school property in MCL 28.425o(1)(a), was expressly establishing a right to openly carry a firearm on school property. Instead, I conclude that *MCL 750.237a(5)(c)* establishes the right of a CPL holder to possess an openly carried firearm on school property and that MCL 28.425o(1)(a) does not compromise that authority. Thus, again, it is not the silence of MCL 28.425o(1)(a) that creates the right, but the authorization of MCL 750.237a(5)(c) that does so.

(6) The concurrence asserts that "MCL 750.237a proscribes conduct—it does not provide any affirmative rights whatsoever to CPL holders . . . ." This is really the heart of the disagreement between myself and the concurrence. By this assertion, the concurrence seeks to transform the statutory conflict here into a metaphysical question. That is, notwithstanding that state law is explicit in excepting a class of persons from statutory prohibitions concerning the possession of firearms on school property, the concurrence asserts that this merely serves to relieve such persons of *criminal* sanctions for carrying firearms on school property rather than actually *permitting* them to carry firearms. This is a wonderfully fine distinction, but one that is *unsupported* by the language of the law (the subject of state law is the actual "possession" and "carrying" of firearms in particular venues), *unsupported* by the logic of the law (MCL 750.237a(5)(c) serves to nullify the prohibitions of MCL 750.237a(4)), *unsupported* by ordinary understandings of the people (that someone is exempt from a prohibition is the equivalent of stating that he or she has a right to do what would otherwise be prohibited),[5] and *unsupported* by common understandings of legislative inten-

[5] Indeed, if MCL 750.237a(5)(c) does *not* mean that CPL holders can possess openly carried firearms on school property, I am unsure what it *does* mean. Indeed, I am unsure what practical meaning, if any, the concurrence itself ascribes to MCL 750.237a(5)(c). Given that MCL 28.425o(1)(a) indisputably controls under what circumstances a CPL holder can possess a *concealed* firearm on school property, the concurrence obviously does not believe that MCL 750.237a(5)(c) controls in this regard. Therefore, if, as the concurrence asserts, MCL 750.237a(5)(c) also does not control in regard to whether a CPL holder can possess an *openly carried* firearm on school property, when does it control? It seems that MCL 750.237a(5)(c) is rendered superfluous under the reasoning of the concurrence, contrary to the well-established rule that "[w]hen interpreting a statute, we must give effect to every word, phrase, and clause and avoid an interpretation

tions (what conceivable purpose is served by large numbers of state laws whose only apparent consequence from the viewpoint of the concurrence is to render conduct *lawful* while not actually *permitting* that conduct?).[6] As discussed earlier, this straightforward proposition is also supported by our caselaw.

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that would render any part of the statute surplusage or nugatory." *People v Rea*, 500 Mich 422, 427-428; 902 NW2d 362 (2017) (citation and quotation marks omitted).

[6] Many examples of this type of legislation can be found in the Penal Code. For example, MCL 750.234e(1) provides that "a person shall not willfully and knowingly brandish a firearm in public," but MCL 750.234e(2)(a) provides that "[s]ubsection (1) does not apply to . . . [a] peace officer lawfully performing his or her duties as a peace officer." I would imagine that everybody would agree that MCL 750.234e works to *permit* a peace officer, lawfully performing his or her duties as a peace officer, to brandish a firearm in public. In addition, MCL 750.449a provides that "a person who engages or offers to engage the services of another person, not his or her spouse, for the purpose of prostitution, lewdness, or assignation, by the payment in money or other forms of consideration, is guilty of a misdemeanor," but MCL 750.451a provides that MCL 750.449a does "not apply to a law enforcement officer while in the performance of the officer's duties as a law enforcement officer." Again, I would imagine that everybody would agree that MCL 750.451a works to *permit* a law enforcement officer, while in the performance of the officer's duties as a law enforcement officer, to solicit a prostitute. Indeed, this understanding is clearly supported by MCL 750.451b, which provides that "[s]ection 451a does not apply to a law enforcement officer if the officer engages in sexual penetration . . . while in the course of his or her duties." In other words, if MCL 750.451a did not permit a police officer to engage in the solicitation of a prostitute, there would have been no need for the Legislature to enact MCL 750.451b as an exception to that otherwise permitted conduct. See also MCL 750.33; MCL 750.45; MCL 750.141a; MCL 750.160a; MCL 750.195; MCL 750.197; MCL 750.200; MCL 750.224; MCL 750.224b; MCL 750.224c; MCL 750.224e; MCL 750.224f; MCL 750.227b; MCL 750.227f; MCL 750.227(2) and MCL 750.231a; MCL 750.233; MCL 750.234; MCL 750.234a; MCL 750.234d; MCL 750.235; MCL 750.282(1)(c); MCL 750.329; MCL 750.410b(1); MCL 750.411w; MCL 750.415(6); MCL 750.473; MCL 750.508; MCL 750.539k; MCL 750.539*l*; MCL 750.552.

Builders Ass'n, 295 Mich at 276;[7] *Nat'l Amusement Co*, 270 Mich at 617.[8] The law is designed to communicate in a reasonably clear and practical manner the day-to-day rights and responsibilities of the people, and the Legislature has done exactly that in this instance, which ought not to be obscured or confused.

(7) The concurrence relies on *Qualls*, 434 Mich at 363-364, because it " 'reject[ed] the rationale . . . that that which the Legislature does not prohibit, it impliedly permits[.]' " The statute in that case stated that " '[t]he storage of fireworks at the site of a wholesaler, dealer, or jobber, except for a retailer who has goods on hand for sale to the public in a supervised display area, shall be as follows . . . .' " *Qualls*, 434 Mich at 370 n 3

[7] The concurrence purports to distinguish *Builders Ass'n* on the basis that the "school policies do not criminalize anything," whereas the ordinance at issue in *Builders Ass'n* did attempt to criminalize conduct the Legislature expressly exempted from criminal penalty. However, this is a distinction without significance. It is well established that "in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits." *Rental Prop Owners Ass'n of Kent Co*, 455 Mich at 262, quoting 56 Am Jur 2d, Municipal Corporations, § 374, p 408 (emphasis omitted). Because the school districts' policies attempt to prohibit an act that the statute permits, the school policies are void. It does not matter that the schools are not attempting to *criminalize* the conduct; all that matters is that the schools are attempting to *prohibit* the conduct.

[8] The concurrence purports to distinguish *Nat'l Amusement Co* on the basis that the statute at issue here prohibits conduct, whereas the statute at issue in *Nat'l Amusement Co* "provided an affirmative right to engage in the conduct at issue and established the circumstances under which the conduct could be carried out." However, this is also a distinction without significance. Although the statute at issue here is generally prohibitory, by creating an exception to a prohibition, it also "provided an affirmative right to engage in the conduct at issue and established the circumstances under which the conduct could be carried out." That is, it provides that a person can possess an openly carried firearm on school property as long as that person is a CPL holder.

(LEVIN, J., dissenting), quoting former MCL 750.243d, repealed by 2011 PA 256 (emphasis omitted). The statute then set forth several requirements regarding the storage of fireworks, including weight restrictions. The ordinance at issue stated that " '[t]he storage of fireworks in a place of retail sales shall be limited to a gross weight of less than one hundred (100) pounds . . . .' " *Id*. at 369 n 1 (emphasis omitted). This Court held that the ordinance did not conflict with the statute because the statute was silent regarding how many pounds of fireworks a retailer could store. However, the majority did not even quote, let alone analyze, the actual language of the statute. That is, the majority concluded that the statute and the ordinance did not conflict, but it did so without examining the actual language of the statute. The issue was whether the statute and the ordinance could be harmonized, and the majority somehow concluded that those provisions could be harmonized without even bothering to examine the actual language of one of those provisions, indeed, the controlling provision. In other words, in a case in which the heart of the issue was one of statutory interpretation, the majority failed to interpret the actual words of the statute in dispute. Instead, it appears that the majority simply relied on an Attorney General opinion that concluded that a *previous* version of the statute allowed a retailer to maintain on the premises a "reasonable amount" of fireworks. *Id*. at 363; OAG, 1979-1980, No. 5536, p 335, at 337 (August 9, 1979). From this the majority concluded that the statute did not conflict with the ordinance. The majority also did not cite, let alone discuss, *Home Builders Ass'n*, 295 Mich at 276, or *Nat'l Amusement Co*, 270 Mich at 617, two cases that, as discussed earlier, stand for the opposite proposition: that which the Legislature ex-

plicitly excludes from prohibition, it impliedly permits.[9]

(8) Far more importantly, however, than either *Qualls*, *Home Builders*, or *Nat'l Amusement* is that the analysis of the concurrence is simply incompatible with first principles of *logic*. When a statute prohibits conduct and then excludes some class of persons from that prohibition, the *only* logical conclusion is that such class of persons is *permitted* to engage in the otherwise prohibited conduct. This is not an issue in which we look to precedent, but to the premises by which reasonable meaning is given to the law, to the premises by which the people are communicated their rights and responsibilities. As a matter of rudimentary logic, if something is *explicitly* not prohibited, it is permitted. I can imagine the question on a middle-school worksheet: the opposite of "not prohibited" is _____? Answer: permitted. It is quite that simple. The law is binary in this regard; conduct is either prohibited or it is not; there is not some Alice-in-Wonderland third realm of the law in which conduct is *neither* prohibited nor permitted. That is not what legislatures intend by their enactments, and it is not what the people comprehend in these enactments; not one Michigan citizen in a hundred would look to the

[9] The concurrence also cites *Miller*, 366 Mich 250, in support of its position. However, *Miller* is significantly distinguishable. *Miller* involved a state statute that prohibited waterskiing from one hour after sundown to one hour before sunrise and an ordinance that prohibited waterskiing on a specific lake after 4:00 p.m. until the following day at 10:00 a.m. In short, the ordinance did not conflict with the statute because the ordinance simply broadened the prohibition contained in the statute; there was no direct conflict between the two. *Miller* did not involve a statute such as the one at issue here that includes an express exception to a prohibition. While an ordinance may broaden prohibitions contained in a statute, an ordinance cannot prohibit what a statute permits.

relevant statutes in this case, read the prohibition on firearms in school zones and then read of the exception for CPL holders, and not conclude—altogether reasonably—that if he or she is a CPL holder, he or she is permitted to do what is prohibited to others. There are countless laws of this state predicated on exactly this same logic and this same commonsense understanding of language. See note 6 of this opinion. To adopt the position of the concurrence—"that that which the Legislature does not prohibit, it [also does not] impliedly permit"—is to engage in gamesmanship with the citizenry, to mislead them in the exercise of their rights and responsibilities, to play "gotcha" by holding people accountable to the law in indeterminate ways when they "confuse" relief from prohibition as the equivalent of permission. If an explicit legal exemption from a general prohibition does not mean that the otherwise prohibited conduct is permitted, what *does* it mean? What legal consequences are faced by persons who assume that such conduct is permitted and who engage in that conduct? The approach advocated by the concurrence would lead to misunderstanding and uncertainty on the part of a law-abiding people seeking to discern from the prescriptions, and proscriptions, of their law what they can and cannot do.[10]

CONCLUSION

In summary, MCL 380.11a(3) authorizes school districts to enact school policies "except as otherwise provided by law," and MCL 750.237a "otherwise provide[s] by law." That is, MCL 750.237a authorizes CPL

[10] Furthermore, matters of logic, as with a judge's personal sense of judicial philosophy or jurisprudence, such as his or her view of appropriate tools of statutory and constitutional interpretation, are not binding in the same sense as legal holdings.

holders to openly carry firearms on school property while the school policies at issue here prohibit this conduct. Because school districts do not have the authority to enact school policies that conflict with state law, the school policies at issue here are invalid. When there is an enactment of the Legislature that provides that a person "may" do something and a subordinate public body provides that he or she "may not" do that same thing, there is a textual, a logical, a legal, and a practical conflict, and the former provision of law prevails; it is that simple. Therefore, I would reverse the judgments of the Court of Appeals.

JOHNSON v VANDERKOOI

HARRISON v VANDERKOOI

Docket Nos. 156057-156058. Argued on application for leave to appeal April 12, 2018. Decided July 30, 2018.

Denishio Johnson filed an action in the Kent Circuit Court against the city of Grand Rapids (the City) and Captain Curtis VanderKooi and Officer Elliott Bargas of the Grand Rapids Police Department (GRPD). Johnson asserted claims under 42 USC 1981 and 42 USC 1983, alleging violations of his constitutional rights. The matter originated in 2011 when the GRPD investigated a complaint that a person, eventually identified as Johnson, was looking into vehicles in a parking lot. After GRPD officers stopped Johnson in the parking lot and were unable to confirm his identity or age, Bargas photographed and fingerprinted Johnson in accordance with the City's photograph and print (P&P) procedure. VanderKooi, who arrived at the scene at some point during this process, approved of Bargas's actions. The GRPD regularly used the P&P procedure for gathering identifying information about individuals during the course of a field interrogation or a stop if an officer deemed it appropriate based on the facts and circumstances of that incident. Johnson was ultimately released and was not charged with a crime. VanderKooi, Bargas, and the City moved separately for summary disposition. The court, George J. Quist, J., granted VanderKooi's and Bargas's motions for summary disposition of Johnson's § 1981 and § 1983 claims and also granted the City's motion for summary disposition, holding, in relevant part, that Johnson had failed to establish that the P&P procedure was unconstitutional on its face or as applied. Johnson appealed, and the Court of Appeals, BOONSTRA and O'BRIEN, JJ. (WILDER, P.J., not participating), affirmed. 319 Mich App 589 (2017).

Keyon Harrison brought a separate action in the Kent Circuit Court against VanderKooi and the City. Harrison asserted claims under 42 USC 1981, 42 USC 1983, and 42 USC 1988, alleging violations of his constitutional rights. The matter originated in 2012 after VanderKooi saw Harrison give someone a large model train engine. VanderKooi became suspicious and confronted Harrison

after following him to a nearby park. Still suspicious after speaking with Harrison, VanderKooi asked another officer to come to the scene and photograph Harrison. An officer arrived and performed a P&P on Harrison. Harrison, too, was released and was not charged with a crime. VanderKooi and the City moved for summary disposition, which the court, George J. Quist, J., granted, holding, in relevant part, that Harrison had not shown that the P&P procedure was unconstitutional. Harrison appealed, and the Court of Appeals, BOONSTRA and O'BRIEN, JJ. (WILDER, P.J., not participating), affirmed in an unpublished per curiam opinion issued May 23, 2017 (Docket No. 330537).

The reasoning of the Court of Appeals was the same in both cases with regard to municipal liability: the City could not be held liable because neither Johnson nor Harrison had demonstrated that any alleged constitutional violation resulted from a municipal policy or a custom that was so persistent and widespread as to practically have the force of law. The Court of Appeals did not decide whether the P&Ps in these cases violated Johnson's or Harrison's Fourth Amendment right to be free from unreasonable searches and seizures. Johnson and Harrison filed a joint application for leave to appeal in the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 954 (2018).

In an opinion by Justice BERNSTEIN, joined by Justices MCCORMACK, VIVIANO, and CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

A policy or custom that authorizes, but does not require, police officers to engage in specific conduct may form the basis for municipal liability, and when an officer engages in the specifically authorized conduct, the policy or custom itself is the moving force behind an alleged constitutional injury arising from the officer's actions. In these cases, the City conceded that there exists a custom of performing a P&P during a field interrogation when an officer deems it appropriate. Whether the GRPD's custom of photographing and fingerprinting individuals as part of field interrogations when there was no probable cause for an arrest had become an official policy of the municipality presented a genuine issue of material fact when the City's admissions, the officers' testimony, the GRPD manual, and other training materials were viewed in the light most favorable to plaintiffs. Additionally, genuine issues of material fact remained concerning causation and whether the policy or custom constituted the moving force behind the alleged constitutional violations. Therefore, the Court of Appeals erred by affirming the trial court's

orders granting summary disposition in favor of the City regarding municipal liability. Accordingly, Part III of the Court of Appeals' opinions in both cases was reversed, and the cases were remanded to the Court of Appeals to determine whether the P&Ps at issue violated Johnson's and Harrison's Fourth Amendment right to be free from unreasonable searches and seizures.

1. Establishing municipal liability under 42 USC 1983 requires proof that (1) a plaintiff's federal constitutional or statutory rights were violated and (2) the violation was caused by a policy or custom of the municipality. A custom may be an accepted, though unwritten, practice of executing governmental policy that is so permanent and well-settled as to have the force of law. An official policy may consist of formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. A policy or custom that authorizes municipal employees to perform their duties in a particular manner represents a deliberate decision of the municipality, and an employee's actions in the performance of his or her duties in the manner authorized may be considered acts of the municipality. To survive a municipality's motion for summary disposition of a claim alleging municipal liability, a plaintiff must first identify a policy or custom of the municipality and then point to facts in the record demonstrating that implementation or execution of that policy or custom caused a violation of the plaintiff's federal constitutional or statutory rights. In this case, the City conceded that the P&P procedure was a custom of the City, and record evidence supported a conclusion that the P&P procedure was also an official policy. The P&P procedure was referenced in the GRPD training manual, which stated that P&Ps were mandatory under some circumstances and that a P&P was something to be included in a field-interrogation report. P&P procedures were listed under the heading "training considerations," and slides from a training presentation included one slide showing a model field-interrogation report with a photograph and a fingerprint card as well as slides describing hypothetical situations in which an officer performed a P&P on an individual suspected of criminal activity but for which probable cause to arrest did not exist. The existence of an official policy was further supported by the reasonable inference that public resources were used both to develop the training materials and to train officers. Even without the City's concession, the evidence viewed in the light most favorable to Johnson and Harrison was sufficient for reasonable minds to

differ regarding the existence of an official policy or custom authorizing the specific conduct that is alleged to be unconstitutional.

2. A municipality's liability for a municipal employee's conduct requires that the policy or custom under which the employee acted was the "moving force" behind the action that gave rise to the alleged constitutional violation. Simply put, the policy or custom must be the cause of the violation. When the action taken or directed by a municipality violates federal law, then the municipal action is the moving force behind a plaintiff's injury and the requirements of causation are satisfied. A policy or custom that authorizes, but does not require, police officers to engage in specific conduct may form the basis for municipal liability, and when an officer engages in the specifically authorized conduct, the policy or custom itself is the moving force behind an alleged constitutional injury arising from the officer's actions. Traditional tort concepts of causation apply to the analysis of causation in the context of municipal liability. To avoid summary disposition, Johnson and Harrison had to demonstrate that reasonable minds could differ about whether the P&P policy or custom was the moving force behind the alleged Fourth Amendment violations. That is, plaintiffs had to point to facts from which a person could reasonably infer that the municipality's policy or custom was the cause in fact and the proximate cause of the alleged constitutional violation. If a policy or custom authorizes, but does not necessarily require, the use of a specific tactic and a police officer acts in accordance with that authorization, then the policy or custom is the cause in fact and the proximate cause of a constitutional violation arising from the use of that tactic. In this case, the municipality authorized the P&P procedure, and police officers exercised their discretion in performing P&Ps. It was reasonably foreseeable that performing a P&P in accordance with the policy or custom in this case would result in a Fourth Amendment violation, assuming that taking a person's fingerprints or picture without probable cause of criminal conduct is unconstitutional. The Court of Appeals erroneously concluded that a municipality cannot be held liable unless its policy or custom specifically directed its employees to violate a person's constitutional rights. A municipality may be liable for authorizing the conduct that violates a person's constitutional rights; the municipality need not specifically direct that its employees engage in that conduct.

3. It was unnecessary to decide whether a § 1983 plaintiff must prove deliberate indifference when alleging that the execu-

tion of a facially lawful policy or custom caused the plaintiff's injury. Rather, it was sufficient to state that a reviewing court must determine whether the plaintiff claims that the alleged injury was caused by a municipal action that itself directed or authorized the violation of a federally protected right or whether the plaintiff claims that a municipality's inaction or omission caused municipal employees to violate the plaintiff's rights. The majority agreed with the concurrence that if the theory of liability is premised on some variant of the latter, then the plaintiff must also show deliberate indifference to prevail. When a theory of liability is based on the absence of governmental action, it makes sense to more critically scrutinize claims of governmental culpability for that absence. But the Supreme Court has never explicitly required such critical scrutiny when the government specifically and affirmatively authorized, but did not require, its employees to engage in allegedly unlawful conduct. In this case, plaintiffs alleged that a municipal action authorized a deprivation of federal rights. Thus, whether plaintiffs specifically claimed that the P&P policy was itself facially unconstitutional was beside the point for the purposes of determining whether the Court of Appeals erred.

Part III of the Court of Appeals' judgments reversed, and cases remanded to the Court of Appeals to determine whether the P&Ps at issue violated Johnson's or Harrison's Fourth Amendment right to be free from unreasonable searches and seizures.

Justice WILDER, joined by Chief Justice MARKMAN and Justice ZAHRA, concurred in the result reached by the majority but wrote separately to provide guidance to future § 1983 plaintiffs and defendants about what they must demonstrate in order to prevail in a municipal-liability case, as well as to provide the clearest guidance possible to lower courts so that they may fairly adjudicate such claims. Specifically, Justice WILDER agreed with the majority that there was a genuine issue of material fact concerning the existence of a municipal policy or custom and whether that policy or custom caused the alleged constitutional violations. A municipality's liability is limited to actions for which the municipality is actually responsible; municipal liability cannot be premised on a respondeat superior theory. If a § 1983 plaintiff alleges that a municipal policy or custom is facially unlawful, he or she need only show that the policy existed and that its implementation caused the violation of his or her federal rights. But if a § 1983 plaintiff alleges that a municipal policy or custom is facially lawful, he or she must show not only that the policy existed and that its execution caused the violation of the plain-

tiff's federal rights, but also that the municipality was deliberately indifferent to the unlawful way in which that policy was implemented. In this case, Johnson and Harrison went to some length to argue that the deliberate-indifference standard did not apply to the instant situation. Consequently, if that were the case, Johnson and Harrison had to show that the municipality's policy of performing P&Ps without probable cause was unconstitutional on its face. The majority suggested that it was unnecessary to address whether the policy itself was facially unconstitutional because the policy authorized the allegedly unconstitutional conduct and, therefore, the alleged constitutional violation was the result of the municipality's actions rather than a failure to train its employees. However, the distinction drawn by the majority was, respectfully, meaningless. An allegation that an employee unconstitutionally applied a facially constitutional policy is the logical equivalent of an allegation that the municipality failed to adequately train its employees in how to constitutionally apply that policy. In either case, the municipality is being held liable because of its failure to ensure that its policy is applied constitutionally. Justice WILDER would have specifically directed the Court of Appeals on remand to decide whether the policy or custom at issue was facially unconstitutional.

CIVIL RIGHTS — MUNICIPAL LIABILITY FOR THE ACTIONS OF POLICE OFFICERS — MUNICIPAL POLICIES OR CUSTOMS.

Establishing municipal liability under 42 USC 1983 requires proof that (1) a plaintiff's federal constitutional or statutory rights were violated and (2) the violation was caused by a policy or custom of the municipality; a municipal policy or custom that authorizes, but does not require, police officers to engage in specific conduct may form the basis for municipal liability under 42 USC 1983, and when an officer engages in the specifically authorized conduct, the policy or custom itself is the moving force behind an alleged constitutional injury arising from the officer's actions.

American Civil Liberties Union Fund of Michigan (by *Miriam J. Aukerman*, *Michael J. Steinberg*, *Kary L. Moss*, *Daniel S. Korobkin*, *Edward R. Becker*, and *Margaret Curtiss Hannon*) for Denishio Johnson and Keyon Harrison.

Elliot Gruszka, Assistant City Attorney, for the city of Grand Rapids.

BERNSTEIN, J. These consolidated cases arise from two separate incidents where plaintiffs were individually stopped and questioned by Grand Rapids Police Department (GRPD) officers. During these stops, plaintiffs' photographs and fingerprints were taken in accordance with the GRPD's "photograph and print" (P&P) procedures. Alleging that the P&Ps violated their constitutional rights, plaintiffs filed separate civil lawsuits in the Kent Circuit Court against the city of Grand Rapids (the City), as well as against the individual police officers involved. The trial court granted summary disposition in favor of all defendants in both cases. Plaintiffs each appealed by right, and the Court of Appeals affirmed in separate opinions.[1] Relevant to this appeal, both opinions affirmed summary disposition for the City on plaintiffs' municipal-liability claims on the basis that a policy that does not direct or require police officers to take a specific action cannot give rise to municipal liability under 42 USC 1983.

We disagree with the Court of Appeals and hold that a policy or custom that authorizes, but does not require, police officers to engage in specific conduct may form the basis for municipal liability. Additionally, when an officer engages in the specifically authorized conduct, the policy or custom itself is the moving force behind an alleged constitutional injury arising from the officer's actions. Accordingly, we reverse in part the judgments of the Court of Appeals, and we remand these cases to the Court of Appeals for further consideration.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The P&Ps giving rise to these lawsuits took place during two separate incidents. At the time of the

[1] See *Johnson v VanderKooi*, 319 Mich App 589; 903 NW2d 843 (2017); *Harrison v VanderKooi*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2017 (Docket No. 330537).

incidents, each GRPD patrol officer was assigned as a part of their standard equipment a camera, a fingerprinting kit, and GRPD "print cards" for storing an individual's copied fingerprints. Generally speaking, a P&P involved an officer's use of this equipment to take a person's photograph and fingerprints whenever an officer deemed the P&P necessary given the facts and circumstances. After a P&P was completed, the photographs were uploaded to a digital log. Completed print cards were collected and submitted to the Latent Print Unit. Latent print examiners then checked all the submitted fingerprints against the Kent County Correctional Facility database and the Automated Fingerprint Identification System. After being processed, the cards were filed and stored in a box according to their respective year.

The first incident giving rise to these lawsuits involved the field interrogation of plaintiff Denishio Johnson. On August 15, 2011, the GRPD received a tip that a young black male, later identified as Johnson, had been observed walking through an athletic club's parking lot and peering into vehicles. Officer Elliott Bargas responded to the tip and initiated contact with Johnson. Johnson, who had no identification, told Bargas that he was 15 years old, that he lived nearby, and that he used the parking lot as a shortcut. Bargas was skeptical of Johnson's story, and being aware of several prior thefts in and near the parking lot, he decided to perform a P&P to see if any witnesses or evidence would tie Johnson to those crimes. After Johnson's mother arrived and verified his name and age, Johnson was released. At some point during this process, Captain Curtis VanderKooi arrived and approved Bargas's actions. Johnson was never charged with a crime.

The second event occurred on May 31, 2012, after VanderKooi observed Keyon Harrison, a young black male, walk up to another boy and hand him what VanderKooi believed was a large model train engine. Suspicious of the hand-off, VanderKooi followed Harrison to a park. After initiating contact, VanderKooi identified himself and questioned Harrison. Harrison, who had no identification, told VanderKooi that he had been returning the train engine, which he had used for a school project. VanderKooi, still suspicious, radioed in a request for another officer to come take Harrison's photograph. Sergeant Stephen LaBrecque arrived a short time later and performed a P&P on Harrison, despite being asked to take only a photograph. Harrison was released after his story was confirmed, and he was never charged with a crime.

Johnson and Harrison subsequently filed separate lawsuits in the Kent Circuit Court, and the cases were assigned to the same judge. Plaintiffs argued, in part, that the officers and the City were liable pursuant to 42 USC 1983 for violating plaintiffs' Fourth and Fifth Amendment rights when the officers performed P&Ps without probable cause, lawful authority, or lawful consent. Both plaintiffs also initially claimed that race was a factor in the officers' decisions to perform P&Ps, though Johnson later dropped that claim.

In two separate opinions, the trial court granted summary disposition in favor of the City pursuant to MCR 2.116(C)(10)[2] and in favor of the officers pursuant to MCR 2.116(C)(7), (C)(10), and (I)(2). Plaintiffs individually appealed by right in the Court of Appeals. In two

[2] MCR 2.116(C)(10) allows a party to move the court for judgment on all or part of a claim when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

separate opinions relying on the same legal analysis, the Court of Appeals affirmed the trial court's judgments regarding plaintiffs' municipal-liability claims.[3] Specifically, the Court of Appeals held that the City could not be held liable because plaintiffs did not demonstrate that any of the alleged constitutional violations resulted from a municipal policy or a custom so persistent and widespread as to practically have the force of law. *Johnson*, 319 Mich App at 626-628. The Court of Appeals did not decide whether the P&Ps actually violated either plaintiff's Fourth Amendment rights.

Plaintiffs filed a joint application for leave to appeal in this Court, challenging the Court of Appeals' ruling on the City's liability under 42 USC 1983. They argued that the record demonstrated that the City had a policy or custom of performing P&Ps without probable cause during investigatory stops pursuant to *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968),[4] which may be based on reasonable suspicion of criminal conduct, and that execution of that policy or custom violated their Fourth Amendment rights. We scheduled oral argument on the application and instructed the parties to address "whether any alleged violation of

[3] In both cases, the Court of Appeals also affirmed that the individual officers were entitled to qualified immunity and that the motion to strike each plaintiff's proposed expert witness was properly granted. The Court of Appeals further held that the P&Ps did not violate plaintiffs' Fifth Amendment rights. *Johnson*, 319 Mich App at 618-620; *Harrison*, unpub op at 5. And in *Harrison*, unpub op at 9-11, the panel affirmed that the record did not support Harrison's equal-protection claim. These issues were not presented in plaintiffs' joint application for leave to appeal in this Court.

[4] "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry*, 392 US at 22.

the plaintiffs' constitutional rights [was] the result of a policy or custom instituted or executed by the defendant City of Grand Rapids." *Johnson v VanderKooi*, 501 Mich 954, 954-955 (2018).

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 120. When reviewing such a motion, "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Id*. A genuine issue of material fact exists when the record "leave[s] open an issue upon which reasonable minds might differ." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997) (quotation marks and citations omitted).

III. ANALYSIS

The issue presented is whether there exists a genuine issue of material fact as to whether the alleged violations of plaintiffs' Fourth Amendment rights were caused by a policy or custom of the City. Plaintiffs' cause of action arises from 42 USC 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

It is undisputed that a local municipality constitutes a "person" to which 42 USC 1983 applies. *Monell v Dep't of Social Servs of the City of New York*, 436 US 658, 690-691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Establishing municipal liability under 42 USC 1983 requires proof that: (1) a plaintiff's federal constitutional or statutory rights were violated and (2) the violation was caused by a policy or custom of the municipality. *Id*. For the purposes of this appeal, we assume that plaintiffs' Fourth Amendment rights were violated by the P&Ps performed by the GRPD officers and focus solely on the second prong of the analysis. *Collins v Harker Hts, Texas*, 503 US 115, 121-122; 112 S Ct 1061; 117 L Ed 2d 261 (1992) (holding that whether a legal violation occurred and whether a municipality might be liable for that violation are separate legal inquiries).

A constitutional violation is attributable to a municipality if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 US at 690. Liability may also be based on a "governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels," *id*. at 691, if the "relevant practice is so widespread as to have the force of law," *Bd of the Co Comm'rs of Bryan Co, Oklahoma v Brown*, 520 US 397, 404; 117 S Ct 1382; 137 L Ed 2d 626 (1997).[5] However,

[5] In *Monell*, 436 US at 691, the United States Supreme Court wrote:

> Congress included customs and usages [in 42 USC 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law. [Quoting *Adickes v S H Kress & Co*, 398 US 144, 167-168; 90 S Ct 1598; 26 L Ed 2d 142 (1970).]

liability may not be based on a respondeat superior theory. *Id*. at 403; *Jackson v Detroit*, 449 Mich 420, 433; 537 NW2d 151 (1995). If the claim is premised on a municipal action that is itself alleged to be unlawful, such as the adoption of the policy at issue in *Monell*, no independent assessment of municipal culpability is necessary. *Brown*, 520 US at 404-405. If, however, a plaintiff does not claim "that the municipal action itself violated federal law, or directed or authorized the deprivation of federal rights," then it must be shown that the municipality acted with deliberate indifference to the obvious risk that the failure to take a different course of action would cause the specific kind of injury alleged. *Id*. at 406; *City of Canton, Ohio v Harris*, 489 US 378, 388; 109 S Ct 1197; 103 L Ed 2d 412 (1989). Under either theory of liability, a plaintiff must also establish "an affirmative link between the policy or custom and the particular constitutional violation alleged." *Jackson*, 449 Mich at 433. Stated differently, the policy or custom must be the "moving force" behind the alleged constitutional violation. *Id*., citing *Monell*, 436 US at 694.

Accordingly, to survive summary disposition, a plaintiff must first identify and connect a policy or custom to the municipality, and then point to facts in the record demonstrating that implementation or execution of that policy or custom caused the alleged constitutional violation.

A. MUNICIPAL POLICY OR CUSTOM

The first question is whether there existed a policy or custom that was attributable to the City. While the policy in *Monell* was memorialized in writing, this is not a prerequisite for a finding of municipal liability. An " 'official policy' often refers to formal rules or understandings—*often but not always committed to*

writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur v Cincinnati*, 475 US 469, 480-481; 106 S Ct 1292; 89 L Ed 2d 452 (1986) (emphasis added). Governmental customs may also give rise to liability. A "permanent and well settled" practice of governmental officials or employees may "constitute a 'custom or usage' with the force of law." *Monell*, 436 US at 691, quoting *Adickes v S H Kress & Co*, 398 US 144, 168; 90 S Ct 1598; 26 L Ed 2d 142 (1970). Thus, accepted, though unwritten, practices of executing governmental policy may give rise to liability for the purposes of *Monell*.[6]

The use of municipal resources to develop and implement practices and procedures can be evidence supporting the existence of an official policy. For example, in *O'Brien v Grand Rapids*, 23 F3d 990 (CA 6, 1994), the United States Court of Appeals for the Sixth Circuit concluded that an official policy arose from the development of a critical incident response plan that was silent as to the need for search warrants during such incidents. The defendants had hired an outside expert as a consultant to train police staff and used the

[6] Several federal courts have reached the same conclusion. See, e.g., *Mobley v Detroit*, 938 F Supp 2d 669, 684 (ED Mich, 2012) (finding the defendant liable based on its unwritten operating procedure of detaining, searching, and prosecuting individuals at unlicensed bars without individualized probable cause); *Hunter v Co of Sacramento*, 652 F3d 1225, 1233 (CA 9, 2011) (holding that a jury instruction defining a custom as "any permanent, widespread, well-settled practice or custom that constitutes a standard operating procedure of the defendant" was consistent with *Monell*); *O'Brien v Grand Rapids*, 23 F3d 990, 1004-1005 (CA 6, 1994) (finding illegal a municipal policy allowing the warrantless entry of homes during the management of critical incidents). Although caselaw from the federal circuits and federal district courts is not binding on this Court, it may be considered for its persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004).

expert's philosophy and teachings to develop a procedure manual. *Id*. at 1002 (opinion by Joiner, J.).[7] As a result, the defendants adopted into practice the notion that search warrants were unnecessary when responding to a critical incident. *Id*. The Sixth Circuit ruled that the commitment of money and personnel, coupled with the consistent conduct of the police officers in executing the practice, conclusively established the existence of an official policy that search warrants were unnecessary during critical incidents. *Id*. at 1003-1005.

We also believe that a municipality may be held liable for unlawful actions that it sanctioned or authorized, as well as for those that it specifically ordered. This conclusion is consistent with the controlling caselaw. In *Pembaur*, 475 US at 471, the question was whether a single verbal order from a prosecutor, who was vested with final decision-making authority, could constitute an official municipal policy. The Supreme Court observed that *Monell* had reasoned that "recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially *sanctioned or ordered*." *Id*. at 480 (emphasis added). Therefore, rather than focus on whether the prosecutor's order was a mandatory directive, the Supreme Court stressed in *Pembaur* that liability could arise from the unconstitutional conduct of an employee only if that conduct was tied to a decision of the municipality. *Id*. at 482-483. Accordingly, the Supreme Court held that liability attaches to a municipality only when "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials

[7] Although his opinion was not the lead opinion, Judge Joiner wrote for the majority in *O'Brien* with regard to the city's liability.

responsible for establishing final policy with respect to the subject matter in question." *Id*. at 483-484. Once a municipality deliberately adopts a course of action, it may be held liable for its employee's violation of the law arising from the execution of that course of action.

Ordering municipal employees to engage in specific unconstitutional conduct, as occurred in *Pembaur* and *Monell*, will clearly lead to a finding of liability. However, a municipality may also deliberately choose to authorize multiple courses of action. For example, a policy could state: if X, one must then do A, B, or C. Even if only *one* of those options constitutes unconstitutional conduct, municipal liability could still result, because the mere act of sanctioning or authorizing the unconstitutional option was a deliberate choice on the part of the municipality. Moreover, a policy need not be written in mandatory terms in order to conclude that a municipality has acted. A policy may be framed in permissive language: if X, one may then do A, B, or C. An employee pursuing any of these options would still be taking an action linked to a deliberate choice of the municipality, even if no single option was mandated.[8]

The Court of Appeals in this case concluded that a municipality may not be held liable unless its policy or

[8] This conclusion is consistent with the Sixth Circuit's application of *Monell* and its progeny in *Garner v Memphis Police Dep't*, 8 F3d 358 (CA 6, 1993). In *Garner*, the defendants had a written policy that authorized, but did not require, the use of deadly force to stop certain nonviolent fleeing suspects. *Id*. at 364. Because the defendants could have adopted a more restrictive deadly force policy, their authorization of the use of deadly force to apprehend some nonviolent suspects was "a deliberate choice from among various alternatives," which made that authorization a policy with the force of law. *Id*. Similarly, the United States Court of Appeals for the Second Circuit has said that if a city "impliedly or tacitly authorized, approved or encouraged harassment" of the plaintiff by the police, then "it promulgated an official policy within the meaning of *Monell*." *Turpin v Mailet*, 619 F2d 196, 201 (CA 2, 1980).

custom specifically directed its employees to violate a person's constitutional rights. We disagree. Authorizing or sanctioning specific conduct is also a deliberate choice of a municipality that may give rise to liability. To hold otherwise would allow a municipality to escape liability merely by reframing an obligatory policy in permissive or discretionary terms. At a practical level, it would let municipalities avoid liability for the use of unconstitutional police tactics by adopting the tactics, but stating that they are not mandatory. This would elevate form over substance in a manner that would ignore the culpability attributable to a municipality as a result of its authorization of the tactics in the first instance. Cf. *Monell*, 436 US at 691-692. We do not believe that 42 USC 1983 and the controlling caselaw permit such a loophole. Accordingly, we hold that a policy or custom that authorizes municipal employees to perform their duties in a particular manner represents a deliberate decision of the municipality and an employee's performance of his or her duties in the manner authorized may be considered acts of the municipality.

B. CAUSATION

Once a municipal policy or custom has been identified, a plaintiff must then show that the policy or custom was also the "moving force" behind the action that gave rise to the alleged constitutional violation. *Monell*, 436 US at 694. In other words, the policy or custom must be the cause of the violation. The causation element of claims made under 42 USC 1983 should generally "be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v Pape*, 365 US 167, 187; 81 S Ct 473; 5 L Ed 2d 492 (1961), overruled

in part on other grounds by *Monell*, 436 US 658. Accordingly, "[t]raditional tort concepts of causation" inform our analysis. *Powers v Hamilton Co Pub Defender Comm*, 501 F3d 592, 608 (CA 6, 2007).

As in a tort action, determining whether causation can be established requires a two-pronged inquiry. A plaintiff must show cause in fact and proximate causation, also known as legal causation. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). The cause in fact element requires proof that " 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id*. at 163. Determining proximate causation requires an examination of the foreseeability of consequences and of whether a defendant should be held legally responsible for the consequences of the defendant's conduct. *Id*. Thus, to establish a genuine issue of material fact, a plaintiff must point to facts from which a person could reasonably infer that the municipality's policy or custom was the cause in fact and the proximate cause of the alleged constitutional violation. See, e.g., *Tsao v Desert Palace, Inc*, 698 F3d 1128, 1146 (CA 9, 2012) ("Under *Monell*, a plaintiff must also show that the policy at issue was the 'actionable cause' of the constitutional violation, which requires showing both but for and proximate causation."), quoting *Harper v Los Angeles*, 533 F3d 1010, 1026 (CA 9, 2008); *Bielevicz v Dubinon*, 915 F2d 845, 850 (CA 3, 1990) ("A plaintiff bears the additional burden of proving that the municipal practice was the proximate cause of the injuries suffered.").

Evidence "that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law" establishes that "the municipal action was the moving force behind the injury . . . ." *Brown*, 520 US at 405. Stated differently, when an

employee acts in accordance with a policy or custom that itself authorizes unconstitutional conduct, the policy or custom is the cause of the constitutional injury. It follows that a municipal employee's actions also flow directly from the municipality when those actions are carried out in the manner that the municipality has previously authorized. Accordingly, a municipal policy or custom is the cause in fact and proximate cause of a constitutional violation if the municipality *authorizes*, but does not necessarily require, the specific conduct that constitutes the violation and its employee acted pursuant to that authorization.[9]

Contrary to the Court of Appeals' holding, federal caselaw suggests that a policy or custom that gives municipal employees some discretion does not per se sever the causal link. For example, in *Garner v Memphis Police Dep't*, 8 F3d 358, 364 (CA 6, 1993), the

[9] This standard has been consistently applied by federal circuit courts. In *Garner*, 8 F3d at 364-365, for example, police officers were authorized, but not required, to shoot nonviolent fleeing suspects by the department's deadly force policy. The Sixth Circuit found that when an officer acted pursuant to that authorization and training, the policy was the cause of the decision to use such force as a matter of law. *Id*. at 365. In *O'Brien*, 23 F3d at 1005 (opinion by Joiner, J.), the Sixth Circuit held that causation was established by the execution of the city's critical incident response plan, which implicitly authorized warrantless entries into homes during critical incidents. The United States Court of Appeals for the Tenth Circuit has similarly stated, "When employees take actions specifically authorized by policy or custom, their actions can be fairly said to be the municipality's." *Simmons v Uintah Health Care Special Serv Dist*, 506 F3d 1281, 1284 (CA 10, 2007). The United States Court of Appeals for the Fourth Circuit has gone so far as to say that independent proof of causation is unnecessary when the conduct authorized is itself unconstitutional. See *Spell v McDaniel*, 824 F2d 1380, 1387 (CA 4, 1987) ("When a municipal 'policy or custom' is itself unconstitutional, i.e., when it directly commands or authorizes constitutional violations, *see, e.g.*, *Monell*, . . . the causal connection between policy and violation is manifest and does not require independent proof.").

defendants' deadly force policy did not require police officers to use deadly force to stop fleeing suspects. However, the deadly force policy was still found to be the "moving force" behind an officer's actions when the officer had been taught that it was "proper to shoot a fleeing burglary suspect in order to prevent escape" and the officer had acted pursuant to that policy. *Id*. at 364-365. Similarly, in *O'Brien*, 23 F3d at 1001, officers maintained the ultimate discretion to determine when a search warrant was necessary in a specific instance. However, when officers followed "the routine practice of not securing warrants during the management of critical incidents," it could be inferred that the policy giving rise to the practice was the moving force behind the alleged constitutional violation. *Id*. at 1004 (opinion by Joiner, J.). In *Chew v Gates*, 27 F3d 1432, 1444 (CA 9, 1994), the defendants had a policy authorizing the use of dogs to find and seize *all* concealed suspects. The officer in *Chew* released a dog because the officer had been informed that he was authorized to do so under the circumstances. *Id*. at 1445. The officer's exercise of discretion in releasing the dog did not break the causal chain where city policy had authorized him to do so. *Id*. at 1446.

As previously stated, when a municipality has approved of specific discretionary employee conduct and an employee acts accordingly, those actions are attributable to the municipality. It follows that, when a policy or custom authorizes specific tactics and the municipality instructs its employees regarding the use of those tactics, then that policy or custom is the cause in fact of an employee's subsequent use of those tactics. And when the tactics themselves are illegal, subsequent violations of the law arising from an employee's use of the tactics are foreseeable and flow directly from the municipality's policy or custom. Accordingly, if a

policy or custom authorizes the use of a specific tactic and a police officer acts in accordance with that authorization, then the policy or custom is the cause in fact and the proximate cause of a constitutional violation arising from the use of that tactic.

IV. APPLICATION

Turning to the cases before us, we hold that the Court of Appeals erred by holding that plaintiffs failed to establish a genuine issue of material fact with regard to the existence of a municipal policy or custom and with regard to causation.

A. MUNICIPAL POLICY OR CUSTOM

We begin by noting that the City conceded during oral arguments that there is a custom within the GRPD of performing P&Ps during field interrogations and stops. The City's briefs also contain numerous references to its "P&P Custom." On the basis of these concessions alone, we conclude that the City has a practice of performing P&Ps during field interrogations and stops and that the practice legally constitutes a governmental custom within the meaning of *Monell*. Additionally, the City's response to a request for admission described its P&P practices as follows:

> . . . Defendant City admits that officers taking photos and thumbprints of individuals *is a custom or practice of the City of Grand Rapids* and has been for decades. The custom or practice has changed over those years with the evolution of technology. . . . A photograph and print might be taken of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. *A photograph and print might be taken in the course of a field*

> *interrogation or a stop if appropriate based on the facts and circumstance of that incident*. [Emphasis added.]

Facts admitted in response to a request for admission are "conclusively established unless the court on motion permits withdrawal or amendment of an admission." MCR 2.312(D). It is also undisputed that GRPD officers are not required to make a probable cause determination before performing a P&P. Thus, the City's admission conclusively established both the existence and the City's knowledge of a longstanding "custom or practice" of performing P&Ps "in the course of a field interrogation or a stop if appropriate based on the facts and circumstances of that incident."

Even without the City's concessions, we find that the evidence, when viewed in the light most favorable to plaintiffs, is sufficient for reasonable minds to differ as to the existence of an official policy authorizing the allegedly unconstitutional conduct. First, the GRPD's Officer Training Tasks manual indicates the existence of an official policy. The manual states that P&Ps are *mandatory* for the issuance of a citation for driving without a license or with a suspended license if the subject has no identification. Outside of the traffic citation context, the manual lists a P&P as something to be included in a field interrogation report and lists "[p]icture and print procedures" under the heading "TRAINING CONSIDERATIONS" without further explanation. Also in the record are slides from a GRPD training presentation showing a model field interrogation report, which includes a photograph and a fingerprint card, to record the results of a P&P. Other slides contain hypothetical examples where a P&P was performed on individuals that officers suspected of criminal activity, though the officers lacked enough information to support an arrest. This suggests that officers

were specifically instructed that it was permissible to perform a P&P during field interrogations when there was not probable cause to make an arrest.

Deposition testimony further suggests the existence of an official policy. VanderKooi testified at his deposition that the P&P procedures have been in place since he joined the GRPD in 1980. When asked what GRPD policies authorize a P&P, VanderKooi explained that the GRPD's field interrogation procedures "state[] that you can take a P and P, meaning photograph and print, under circumstances where you're engaged in a contact or stop or detained somebody[;] . . . it outlines the guidelines for taking pictures and prints, as well as writing police reports." He also testified that taking a person's fingerprints is "a common investigative tactic to either incriminate or eliminate" suspicion. In Johnson's case, Bargas testified that the P&P he performed was in accordance with GRPD policy. In Harrison's case, LaBrecque testified that he was called to the location specifically to perform a P&P, which he did, despite the fact that VanderKooi apparently requested only Harrison's photograph. The officers' testimony demonstrates that they treated the GRPD's P&P procedure as an official policy.

The existence of an official policy is additionally supported by the reasonable inference that public resources were used both to develop the training materials discussed earlier and also to train officers. The GRPD is the law enforcement branch of the City, and it is funded by tax revenue that the City allocates for law enforcement purposes. Thus, the GRPD's training materials regarding its P&P procedures were funded by money from the City's coffers. This is analogous to the use of municipal resources in *O'Brien*, 23 F3d at 1005 (opinion by Joiner, J.), to hire an outside consultant,

hold training sessions, and develop written manuals for a critical incident response plan. Although developing the P&P procedures may have required fewer resources than the response plan in *O'Brien*, the City nonetheless dedicated money and personnel to develop and implement the P&P procedure, and therefore, a reasonable person could infer that the City made a deliberate choice to authorize the use of P&Ps during field interrogations.

The evidence thus supports plaintiffs' theory that there was an official P&P policy, i.e., a "fixed plan[] of action to be followed under similar circumstances consistently and over time." *Pembaur*, 475 US at 480-481. That the City may not have outlined in its training materials what specific facts and circumstances justify performing a P&P does not preclude a juror from inferring that the custom has, over time, evolved into an official policy within the meaning of *Monell*. Therefore, even without the City's concession, there are genuine issues of material fact regarding the existence of an official municipal policy.

B. CAUSATION

As the party opposing summary disposition, plaintiffs bear the burden of demonstrating that reasonable minds could differ about whether the P&P policy or custom was the moving force behind the alleged Fourth Amendment violations. Plaintiffs argued that performing a P&P without first making a probable cause determination violated their constitutional rights. According to plaintiffs, the City's policy is to authorize and train GRPD officers to perform a P&P without first establishing probable cause. In other words, plaintiffs allege that an affirmative municipal action, the execution of the alleged P&P policy, violates federal law. As

stated in *Brown*, 520 US at 405, proof "that the action taken or directed by the municipality . . . itself violates federal law will also determine that the municipal action was the moving force behind the injury" complained of. Thus, if the City's policy or custom is unconstitutional, *Brown* states that causation can be inferred.

The constitutionality of the City's policy or custom has yet to be determined. However, we find that the tort concepts of cause in fact and proximate causation demonstrate that the evidence permits a reasonable inference that the City's P&P policy or custom was the moving force behind the alleged Fourth Amendment violations. First, the City appears to have conceded that the policy or custom was the cause in fact of any alleged constitutional violations.[10] Additionally, circumstantial evidence indicates as much. See *Skinner*, 445 Mich 164 ("[A] plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation."). Bargas agreed that when he performed a P&P on Johnson, it was in accordance with GRPD policies. VanderKooi testified that he wanted a P&P of Harrison to preserve Harrison's identity, which is a primary reason the P&P tactic is used during field interrogations. The training slides and the GRPD manual previously discussed indicate that officers were instructed to use P&Ps during field interroga-

[10] The City stated the following in its supplemental brief filed in this Court:

> The City may freely concede that in the absence of the Field Interrogation P&P Custom, Appellants would not have had their pictures or prints taken during their respective investigatory stops. But . . . even if having their pictures and prints taken during a lawful stop somehow violated their constitutional rights, the Custom itself was *not* the moving force behind those violations.

tions. Additionally, the City has not argued that the officers in these cases were acting contrary to their training or GRPD policies. In the absence of evidence to the contrary, we think it more reasonable to infer that the officers performed the P&Ps in accordance with their prior training than to infer that the officers acted spontaneously. Thus, a reasonable person could infer that the City's P&P policy or custom was the cause in fact of the alleged Fourth Amendment violations.

Turning to proximate causation, we must consider whether the injury alleged was a foreseeable consequence of the City's policy or custom. See *id*. at 163. More specifically, was it reasonably foreseeable that performing a P&P in accordance with the alleged policy or custom would result in a Fourth Amendment violation? We have no difficulty concluding that the answer is yes.

No party has argued that the officers here did anything other than follow the City's P&P policy or custom. The record shows that GRPD officers were, at a minimum, authorized and trained to perform P&Ps during any field interrogation or stop in which an officer believed a P&P was appropriate. It is reasonably foreseeable that when a police department authorizes and trains its officers to use a specific investigative tactic, the officers will follow that training. While the City suggests that officers must consider the facts and circumstances of each encounter, there is no indication that the officers were instructed that probable cause of criminal conduct was a prerequisite to performing a P&P. The potential problem for the City is that performing a P&P without probable cause might violate a person's Fourth Amendment rights. US Const, Am IV ("The right of the people to be secure in

their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."). If the nonconsensual fingerprinting of a person without probable cause is unconstitutional, then the execution of the P&P policy authorizing such conduct would result in a constitutional violation. This is sufficient to show that reasonable minds could differ as to proximate causation.

V. RESPONSE TO THE CONCURRENCE

The concurring opinion argues that whenever a 42 USC 1983 plaintiff alleges that the execution of a facially lawful policy or custom caused his or her injury the claim must be reviewed pursuant to the deliberate-indifference standard. We find it unnecessary to adopt or reject that interpretation of the controlling Supreme Court cases. Rather, we think it sufficient for a reviewing court to determine whether the plaintiff claims that the alleged injury was caused by a municipal action that itself directed or authorized the violation of a federally protected right or whether the plaintiff claims that a municipality's inaction or omission caused municipal employees to violate the plaintiff's rights. We agree with the concurrence that if the theory of liability is premised on some variant of the latter, then the plaintiff must also show deliberate indifference to prevail.

No one disputes that we are bound to follow the decisions of the Supreme Court on matters of federal law. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). The United States Supreme Court held in *Canton*, 489 US at 388, "that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with

whom the police come into contact." The Supreme Court acknowledged that the training program in *Canton* was lawful, and the Court's analysis focused on the narrow issue of whether a policy of inaction (i.e., the failure to train) could serve as a basis for liability. The phrases "facially constitutional" or "facially lawful" are noticeably absent from that opinion. And in *Brown*, 520 US at 415-416, the Supreme Court held that the county was not liable for the sheriff's isolated decision to hire a deputy without adequate screening, because the respondent had not shown that the sheriff's decision "reflected a conscious disregard for a high risk that [the deputy] would use excessive force in violation of respondent's federally protected right." The *Brown* Court, 520 US at 407, added the "facially lawful" language to its *restatement* of *Canton*'s holding, but it did not expressly rule that the deliberate-indifference standard applies in every case in which a plaintiff argues that the execution of a facially lawful policy or custom caused his or her injury.[11] Instead, the Supreme Court merely said that "[c]laims not involving an allegation that the municipal action itself violated federal law, or directed or authorized the deprivation of federal rights, present much more difficult problems of proof," and that such claims require a showing of deliberate indifference. *Id*. at 406-407. See also *Connick v Thompson*, 563 US 51, 60-61; 131 S Ct 1350; 179 L Ed 2d 417 (2011) (evaluating under the deliberate indifference standard a theory of liability based on a municipality's decision not to provide training on a specific topic to certain employees). When a

[11] Indeed, the Supreme Court was silent as to whether *Canton* or *Brown* created such a rule in its more recent decision in *Connick v Thompson*, 563 US 51; 131 S Ct 1350; 179 L Ed 2d (2011), which also involved a municipal liability claim premised on an alleged failure to train government employees.

theory of liability is based on the *absence* of governmental action, it makes sense to more critically scrutinize claims of governmental culpability for that absence. But the Supreme Court has never explicitly required such critical scrutiny when the government specifically and affirmatively authorized, but did not require, its employees to engage in allegedly unlawful conduct.[12]

In this case, we have an allegation that a municipal action *did* authorize a deprivation of federal rights. Plaintiffs aver that a policy or custom affirmatively authorized the use of a specific investigative tactic during field interrogations and that GRPD officers were trained to believe that it was appropriate to use this tactic in the absence of probable cause. Under plaintiffs' theory, the municipality affirmatively authorized the precise conduct alleged to be unlawful and implemented its policy through the GRPD's training of officers to use a P&P in the manner that is alleged to be unconstitutional. Thus, whether plaintiffs specifically claim that the P&P policy is itself facially unconstitu-

[12] The concurrence cites decisions in which *Canton* and *Brown* have been interpreted as requiring application of the deliberate-indifference standard in 42 USC 1983 cases involving an alleged injury arising from the execution of a facially lawful policy or custom. At least one federal circuit court has declined to adopt this interpretation. See *Christensen v Park City Muni Corp*, 554 F3d 1271, 1280 (CA 10, 2009) ("If a governmental entity makes and enforces a law that is unconstitutional as applied, it may be subject to liability under § 1983."). It also appears, for reasons that are not readily apparent, that several other federal appellate courts have not addressed the issue or have not found it necessary to expand on *Canton* and *Brown* in the manner that is suggested by the concurrence. See, e.g., *Cash v Co of Erie*, 654 F3d 324, 333-334 (CA 2, 2011); *Jenkins v Bartlett*, 487 F3d 482, 492 (CA 7, 2007); *Young v Providence*, 404 F3d 4, 25-28 (CA 1, 2005); *Daskalea v Dist of Columbia*, 343 US App DC 261, 269; 227 F3d 433 (2000). Beyond our belief that it is not necessary at this time to adopt or reject the concurring opinion's interpretation of *Canton* and *Brown*, we offer no further opinion as to the merits of the concurrence's position on that issue.

tional is beside the point for the purposes of determining whether the Court of Appeals erred, because the policy or custom identified by plaintiffs represents a municipal action that *itself* "authorized" allegedly unconstitutional conduct. See *Brown*, 520 US at 406-407.[13] "Where a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward." *Brown*, 520 US at 404-405. "[T]he conclusion that the action taken or directed by the municipality . . . itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains." *Id*. at 405. Thus, this is a "straightforward" case more akin to *Monell* and *Pembaur* than *Brown* or *Canton*. See *id*. at 404-405.

We took this case to decide only whether any alleged violation of the plaintiffs' constitutional rights was the result of a policy or custom instituted or executed by the City. Having concluded that the Court of Appeals erred by ruling against plaintiffs on this issue, it is unnecessary at this time for us to reach the additional issue addressed by the concurring opinion.[14]

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[13] As the concurrence acknowledges, in this Court, plaintiffs have declined to argue in the alternative that the GRPD officers inflicted the alleged constitutional injury because of some policy or custom of inaction or omission on the part of the City.

[14] Our opinion should not be read as implying that whether the policy or custom identified by plaintiffs is facially constitutional or facially unconstitutional is irrelevant to this case as a whole. The Court of Appeals has yet to determine whether a constitutional violation occurred, much less whether the City's policy or custom is facially unconstitutional, because it erroneously concluded that no such policy or custom existed. The concurring justices appear eager to indicate how they would decide certain issues that could arise on remand, and what law they would adopt in such circumstances. We merely prefer to wait until those issues are properly presented to us before we opine on the subject further.

VI. CONCLUSION

In summary, we hold that it has been conclusively established by the City's concession that there exists a custom of performing a P&P during a field interrogation when an officer deems it appropriate. We further hold that, even without the City's concession as to the existence of a custom, the City's admissions, the officers' testimony, the GRPD manual, and the training materials, when viewed in the light most favorable to plaintiffs, are sufficient to create a genuine issue of material fact as to whether the City's custom has become an official policy. Genuine issues of material fact also remain concerning causation. Therefore, the Court of Appeals erred by affirming the trial court's order granting summary disposition based on the Court's conclusion that the alleged constitutional violations were not the result of a policy or custom of the City. We express no opinion with regard to whether plaintiffs' Fourth Amendment rights were violated. Therefore, we reverse Part III of the Court of Appeals' opinion in both cases. We remand these cases to the Court of Appeals to determine whether the P&Ps at issue here violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures.

MCCORMACK, VIVIANO, and CLEMENT, JJ., concurred with BERNSTEIN, J.

WILDER, J. (*concurring in the judgment*). I concur in the result reached by the majority. I write separately to fully explain the basis of my concurrence, including my understanding of the majority's holdings and the inquiry facing the Court of Appeals on remand. In my judgment, the majority opinion gives insufficient guidance to the bench and the bar concerning the state of

the law governing municipal liability. I believe that we owe future § 1983 plaintiffs, who have suffered harm at the hands of a local government unit, and defendants, who need to understand the legal requirements governing their behavior, a thorough understanding of what they must demonstrate in order to prevail. At the same time, we are also obligated to give the clearest guidance possible to lower courts, so that they may adjudicate such claims as fairly as possible.

I

This case involves the proper application of § 1 of the Ku Klux Klan Act of 1871, now codified as 42 USC 1983. Section 1983 states, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The United States Supreme Court has long held that this statute provides a cause of action for those claiming the deprivation of a federal right by a "person" acting under the authority of state law. *Monroe v Pape*, 365 US 167, 171-187; 81 S Ct 473; 5 L Ed 2d 492 (1961), overruled in part on other grounds by *Monell v Dep't of Social Servs of the City of New York*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978).

In *Monell*, the Court held that a local unit of government was a "person" within the meaning of § 1983 and, as such, could be sued under the statute. *Monell*, 436 US at 690. Yet the Court also ruled that the law's text and history compelled the further con-

clusion that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id*. at 691. In other words, there was no respondeat superior liability under § 1983; a municipality could not be held to account solely because it employed a tortfeasor. *Id*. In order to distinguish between an injury exacted solely by an employee and one attributable to the municipality, the Court concluded that "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id*. at 694.

Monell admittedly sketched the contours of municipal liability broadly. *Id*. at 695. And it was not until later that the Court refined the scope of municipal liability in *Pembaur v Cincinnati*, 475 US 469, 471; 106 S Ct 1292; 89 L Ed 2d 452 (1986). There, the Court examined whether a conscious decision by a municipal policymaker on a single occasion could constitute an official policy for the purposes of *Monell* liability. The Court answered yes, making it clear that *Monell* was, after all, a case about the allocation of responsibility. *Id*. at 475. *Monell*'s "policy or custom" requirement was "intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id*. at 479-480. As a logical corollary, liability could attach on the basis of a policymaker's single decision. All that mattered was that the decision was made by an official " 'whose acts or edicts may fairly be said to represent official policy.' " *Id*. at 480, quoting *Monell*, 436 US at 694. This was true regardless of whether the policymaker's decision "officially sanctioned" or otherwise

"ordered" the conduct. *Pembaur*, 475 US at 480. In either case, the policymaker's decision represented "a deliberate choice" on behalf of the municipality to follow a particular course of action. *Id*. at 483 (opinion of Brennan, J.).[1]

Monell and *Pembaur* make it clear that "municipal liability is limited to action for which the municipality is actually responsible." *Id*. at 479-480 (opinion of the Court). Furthermore, liability premised on anything less than " 'acts or edicts [that] may fairly be said to represent official policy' " amounts to legal responsibility premised solely on a respondeat superior theory. *Id*. at 480, quoting *Monell*, 436 US at 694. But since municipalities can only act through living persons, identifying conduct properly attributable to the municipality, in contrast to conduct that is actually the fault of an employee, presents a hard conceptual problem. *Monell* and *Pembaur* were, in fact, easy cases. They involved deliberate, unlawful action on behalf of municipal policymakers. *Monell* represents the situation in which local government officials have chosen to promulgate and implement an unconstitutional directive. In that type of case, the connection between culpable municipal conduct and eventual injury is relatively clear, even though municipal employees are usually responsible for carrying out the unlawful order. Similarly, *Pembaur* embodies the situation in which a municipal policymaker has, himself or herself, chosen to violate federal law. The implementation of this unlawful decision is subsumed by the initial choice to pursue that course of action. So again, the connection between culpable municipal conduct and eventual injury is readily apparent.

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[1] Justice Brennan authored the opinion of the Court in *Pembaur*, but only three justices joined Part II(B) of that opinion. *Pembaur*, 475 US at 481-484.

In *City of Canton, Ohio v Harris*, 489 US 378, 380; 109 S Ct 1197; 103 L Ed 2d 412 (1989), the United States Supreme Court addressed a harder question: whether a municipality could be liable based on its failure to act rather than its affirmative conduct. More specifically, *Canton* asked whether a failure to adequately train municipal employees could ever form the basis of *Monell* liability. *Canton* explained that a municipal policy did not have to be unconstitutional, in and of itself, to implicate *Monell*. *Id*. at 387. But the fact that an employee happened to apply a lawful policy in an unconstitutional manner could not, without more, give rise to municipal liability. *Id*. "[F]or liability would then rest [solely] on [a] respondeat superior" theory. *Id*. Accordingly, in the absence of apparent deliberate conduct, there had to be a degree of fault sufficient to infer that the municipality's inaction represented a conscious decision. *Id*. at 389. Reviewing a range of options, the Court held that inadequate training "may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of [those affected]." *Id*. at 388. In the Court's view, this was consistent with the underlying thrust of *Monell* that "[o]nly where a failure to [act] reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable." *Id*. at 389.[2]

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[2] Although not binding on this Court, a number of federal appellate courts have since held that a municipality cannot be deliberately indifferent to a plaintiff's constitutional rights if those rights were not clearly established when the policy or custom was promulgated. See, e.g., *Arrington-Bey v City of Bedford Hts, Ohio*, 858 F3d 988, 994 (CA 6, 2017) (" '[A] municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.' "), quoting *Hagans v Franklin Co Sheriff's Office*, 695 F3d 505, 511 (CA 6, 2012); *Szabla v City of Brooklyn Park, Minnesota*, 486 F3d 385, 393 (CA 8, 2007) (en banc) ("[W]e agree

Canton's deliberate-indifference standard was interpreted by lower federal courts to apply whenever a plaintiff alleged that a federal right was violated pursuant to a policy that was facially lawful. *Gonzalez v Ysleta Indep Sch Dist*, 996 F2d 745, 757-758 (CA 5, 1993) (reviewing decisions from various federal circuits concluding that *Canton* applied whenever a plaintiff claimed that a facially constitutional policy was applied unlawfully by a municipal employee).[3] This is understandable. If *Monell* and *Pembaur* were easy cases because the line between culpable municipal conduct and injury was clear, an allegation that a municipality has failed to prevent its employees from unlawfully executing an otherwise valid policy presents no such obvious line of accountability. For *Monell* purposes, the important question remains whether such a failure to act may constitute a deliberate attempt to commit a constitutional injury. On one side of that line lies municipal liability; on the other lies vicarious liability for the acts of employees. When viewed in this light, *Canton*'s deliberate indifference

with the Second Circuit and several district courts that a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established."), citing *Townes v City of New York*, 176 F3d 138, 143-144 (CA 2, 1999); *Gonzalez v Ysleta Indep Sch Dist*, 996 F2d 745, 759-760 (CA 5, 1993) (stating that a "municipality only can be held liable for a constitutional violation caused by a municipality that manifests at least deliberate indifference to constitutional rights" and that "it may well be . . . that to be deliberately indifferent to rights requires that those rights be clearly established") (quotation marks and citations omitted); *Williamson v City of Virginia Beach, Virginia*, 786 F Supp 1238, 1264-1265 (ED Va, 1992) ("[Even if] the constitutional rights alleged by plaintiff did exist, the conclusion that they were not clearly established negates the proposition that the city acted with deliberate indifference."), aff'd 991 F2d 793 (CA 4, 1993) (Table).

[3] A law is facially unconstitutional if "no set of circumstances exists under which the Act would be valid." *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987).

standard is simply the functional equivalent of the culpable conduct that setting an unlawful policy presupposes. It is clear from this that a municipality can only be liable for failing to prevent its employees from unconstitutionally implementing a constitutional policy if the municipality was deliberately indifferent to the risk of harm that would follow. That is, only under these circumstances is the failure to act synonymous with a "deliberate," or "conscious," unlawful choice on behalf of the municipality.

The United States Supreme Court later confirmed this understanding of *Canton*. In *Bd of the Co Comm'rs of Bryan Co, Oklahoma v Brown*, 520 US 397, 402; 117 S Ct 1382; 137 L Ed 2d 626 (1997), the Court addressed the question of whether a single hiring decision by a policymaker could be a "policy" that triggered municipal liability. The Court held that it could, in limited circumstances. And in coming to that conclusion, the Court summarized the import of its *Monell* jurisprudence:

> Where a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward. . . . [P]roof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains. . . .
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> * * *
>
> [But c]laims not involving an allegation that the municipal action itself violated federal law, or directed or

> authorized the deprivation of federal rights, present much more difficult problems of proof. That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation; the plaintiff will simply have shown that the *employee* acted culpably. We recognized these difficulties in *Canton* v. *Harris* . . . . [A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice. [*Id*. at 404-405, 406-407 (citations omitted).]

According to the *Brown* Court, this legal framework reflected the rigorous standards of culpability and causation necessary to prevent municipal liability from collapsing into respondeat superior. *Id*. at 410. Anything less would ignore what was recognized in *Monell* and repeatedly affirmed: "Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights." *Id*. at 415.

This Court is bound by the decisions of the United States Supreme Court on matters of federal law. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). And municipal liability under § 1983, a federal statute, undoubtedly constitutes such a matter. Accordingly, I believe that this Court is compelled to conclude the following: if a § 1983 plaintiff alleges that a municipal policy or custom is facially *unlawful*, he or she need only show that the policy existed and that its implementation caused the violation of his or her federal rights. But if a § 1983 plaintiff alleges that a municipal policy or custom is facially *lawful*, he or she must show not only that the policy existed and that its execution caused the violation of his or her federal

rights, but also that the municipality was deliberately indifferent to the unlawful way in which that policy was implemented. Only then can it be said that a municipality has made a "deliberate or conscious choice" to direct or sanction unconstitutional conduct. *Pembaur*, 475 US at 483 (opinion of Brennan, J.).[4]

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[4] Although it does not control this Court's decision, this understanding of municipal liability under § 1983 is supported by an overwhelming majority of other jurisdictions. See, e.g., *Szabla*, 486 F3d at 390 ("Where a policy is constitutional on its face, but it is asserted that a municipality should have done more to prevent constitutional violations by its employees, a plaintiff must establish the existence of a 'policy' by demonstrating that the inadequacies were a product of deliberate or conscious choice by policymakers."); *Kelly v Borough of Carlisle*, 622 F3d 248, 264 (CA 3, 2010) ("[I]n order to be held liable for a facially valid policy, [a] municipality must have acted with deliberate indifference."); *Gregory v City of Louisville*, 444 F3d 725, 752 (CA 6, 2006) ("Where the identified policy is itself facially lawful, the plaintiff must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences.") (quotation marks and citation omitted); *American Federation of Labor & Congress of Indus Organizations v City of Miami, FL*, 637 F3d 1178, 1187 (CA 11, 2011) ("If a facially-lawful municipal action is alleged to have caused a municipal employee to violate a plaintiff's constitutional rights, the plaintiff must establish that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. As none of the policies in question here are facially unconstitutional, this presents the plaintiffs with a difficult task.") (quotation marks and citation omitted); *Burge v St Tammany Parish*, 336 F3d 363, 370 (CA 5, 2003) ("Where . . . an alleged policy or custom is facially innocuous, establishing the requisite official knowledge requires that a plaintiff establish that an official policy was promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result.") (quotation marks and citation omitted); *Gibson v Co of Washoe, Nevada*, 290 F3d 1175, 1186 (CA 9, 2002) ("[A] plaintiff can allege that through its *omissions* the municipality is responsible for a constitutional violation committed by one of its employees, even though the municipality's policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation. However, because *Monell* held that a municipality may not be held liable

In this case, plaintiffs have gone to some length to argue in their briefing and during oral argument that the deliberate-indifference standard does not apply to this particular controversy.[5] Therefore, because I agree with the majority that plaintiffs claim that the Grand Rapids Police Department had a policy or custom of completing "P&Ps"[6] during field interrogations without probable cause and that this policy caused the viola-

under a theory of respondeat superior, a plaintiff must show that the municipality's deliberate indifference led to its omission and that the omission caused the employee to commit the constitutional violation.") (citation omitted), overruled on other grounds by *Castro v Co of Los Angeles*, 833 F3d 1060 (CA 9, 2016); *Elkins v McKenzie*, 865 So 2d 1065, 1074 (Miss, 2003) ("While an unconstitutional official policy renders a municipality culpable under § 1983, even a facially innocuous policy will support liability if it was promulgated with deliberate indifference to the known or obvious consequences that constitutional violations would result.") (quotation marks and citation omitted); *Peak Alarm Co, Inc v Salt Lake City Corp*, 243 P3d 1221, 1247 (Utah, 2010) ("A plaintiff may attack a municipal policy or custom in two ways. A plaintiff may attempt a facial attack on the local government's policy, alleging the policy itself is a violation of federal law. Alternatively, a plaintiff may saddle a municipality with § 1983 liability despite facially valid policies and customs by demonstrating 'deliberate indifference' on the part of the local government.") (citations omitted); *Democracy Coalition v City of Austin*, 141 SW3d 282, 290 (Tex App, 2004) ("To subject a municipality to section 1983 liability, a 'policy' must either be *per se* unconstitutional ('facially unconstitutional') or promulgated in deliberate indifference to the 'known or obvious consequences' that constitutional violations would result (a 'facially innocuous policy').") (citation omitted). But see *Christensen v Park City Muni Corp*, 554 F3d 1271, 1280 (CA 10, 2009) ("If a governmental entity makes and enforces a law that is unconstitutional as applied, it may be subject to liability under § 1983.").

[5] Plaintiffs stated in their appellate brief that the municipality's failure to act was not at issue in this case. Plaintiffs' reply brief stated that the deliberate-indifference standard was inapplicable. And in oral argument, plaintiffs explicitly disavowed the need to demonstrate deliberate indifference.

[6] "P&P" means "photograph and print." It refers to the process, performed in the field, of photographing and fingerprinting individuals who have been detained by police officers.

tion of plaintiffs' constitutional rights, in my view, under the principles just discussed, plaintiffs must eventually show not only that the complained-of municipal policy existed and that its execution by Grand Rapids Police Department officers caused their constitutional injuries, but also that the policy or custom was facially unconstitutional.

II

The majority suggests that in this case it is unnecessary to address whether the policy itself is facially unconstitutional: because the policy authorizes the allegedly unconstitutional conduct, the alleged constitutional violation was the result of the municipality's actions rather than a failure to train its employees. However, with respect, this is a meaningless distinction. An allegation that an employee unconstitutionally applied a facially constitutional policy is the logical equivalent of an allegation that the municipality failed to adequately train its employees in how to constitutionally apply that policy. In either case, the municipality is being held liable because of its failure to ensure that its policy is applied constitutionally. Indeed, if the municipality appropriately trained its employees as to the constitutional manner in which to apply the policy, the municipality would indisputably not be liable if an employee nonetheless applied the policy in an unconstitutional manner.[7]

[7] Recognizing that my view of the law of municipal liability is in accordance with a wide range of jurisdictions, see note 4 of this opinion, the majority notes that "several other federal appellate courts have not addressed the issue or have not found it necessary to expand on *Canton* and *Brown* in the manner that is suggested by the concurrence." *Ante* at 779 n 12. But with the exception of *Christensen v Park City Muni Corp*, 554 F3d 1271, 1278-1280 (CA 10, 2009), all of the cases cited by the majority addressed situations in which a plaintiff specifically alleged that the municipality was deliberately indifferent; none of these cases

III

Today, the majority holds (1) that "a policy or custom that authorizes municipal employees to perform their duties in a particular manner represents a deliberate decision of the municipality and an employee's performance of his or her duties in the manner authorized may be considered acts of the municipality," *ante* at 767, and (2) that "if a policy or custom authorizes the use of a specific tactic and a police officer acts in accordance with that authorization, then the policy or custom is the cause in fact and the proximate cause of a constitutional violation arising from the use of that tactic," *ante* at 770-771. I concur in the judgment of the majority opinion insofar as it concludes that there is a genuine issue of material fact concerning the existence of a municipal "policy or custom" and whether that "policy or custom" caused the constitutional violations alleged. Additionally, because plaintiffs do not allege deliberate indifference by the city of Grand Rapids, I would specifically direct the Court of Appeals to decide on remand whether the complained-of "policy or custom" was facially unconstitutional. Only by prevailing

addressed whether, in the absence of a showing of deliberate indifference, a municipality may be held liable because of the unconstitutional application of a facially lawful policy by municipal employees. See *Cash v Co of Erie*, 654 F3d 324, 332-339 (CA 2, 2011) (identifying sufficient evidence to support a jury finding that a sheriff acted with deliberate indifference); *Jenkins v Bartlett*, 487 F3d 482, 492-493 (CA 7, 2007) (finding no genuine issue of material fact as to whether there was a constitutional violation and as to whether the municipality was deliberately indifferent); *Young v Providence*, 404 F3d 4, 26-31 (CA 1, 2005) (finding a genuine issue of material fact as to whether the training program was deficient and whether the municipality was deliberately indifferent); *Daskalea v Dist of Columbia*, 343 US App DC 261, 269; 227 F3d 433 (2000) (concluding that "the jury had more than sufficient evidence upon which to base its finding of deliberate indifference").

on that issue can plaintiffs demonstrate that the municipality is actually liable for their alleged injuries. In other words, only then will the connection between culpable municipal conduct and harm be sufficiently firm to implicate *Monell* liability.[8]

MARKMAN, C.J., and ZAHRA, J., concurred with WILDER, J.

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[8] The majority insinuates that I am going further than necessary by addressing whether plaintiffs must show that the policy or custom at issue was facially unconstitutional in order to recover from defendant. See *ante* at 780 n 14. The fundamental issue in this case is under what circumstances a municipality may be held liable for alleged constitutional violations perpetrated by its employees while acting in accordance with a municipal policy or custom. The majority opinion insinuates that if plaintiffs' constitutional rights were violated, their claims against the municipality may proceed, regardless of whether the complained-of policy or custom was facially unconstitutional. For the reasons stated in this opinion, I conclude that a municipality may only be held liable for violating an individual's constitutional rights as a result of executing a policy or custom of the municipality if the policy or custom is facially unconstitutional or if the policy or custom was enacted with deliberate indifference. This is a pure issue of law that is necessary to the disposition of this case and was briefed by both parties. Accordingly, I believe it is entirely appropriate to explain why I disagree with the majority's insinuation and to describe the analysis that the Court of Appeals should undertake on remand.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Leave to Appeal Denied June 15, 2018:

MCNEILL-MARKS v MIDMICHIGAN MEDICAL CENTER-GRATIOT, No. 154159; reported below: 316 Mich App 1. On April 12, 2017, the Court heard oral argument on the application for leave to appeal the June 16, 2016 judgment of the Court of Appeals. By order of July 7, 2017, the parties were directed to file additional supplemental briefs. On order of the Court, the supplemental briefs having been received, the application is again considered, and it is denied.

ZAHRA, J. (*dissenting*). I respectfully dissent from the majority's order denying leave in this case. This action arises from a claim brought under the Michigan Whistleblowers' Protection Act (WPA),[1] a law enacted to protect employees from adverse employment consequences that result from the employee's reporting of actual or suspected violations of law.[2] The issue presented in this case is whether an employee is reporting suspected illegal activity to a public body under MCL 15.362—a protected activity under the WPA—when that employee merely informs her private attorney about another person purportedly violating a personal protection order (PPO). The trial court granted summary disposition to defendant on the ground that plaintiff had not reported a suspected illegal activity to a public body under the WPA. The Court of Appeals reversed, holding that plaintiff's private attorney, as a mandatory member of the State Bar of Michigan, is a "public body." Following oral argument on defendant's application for leave to appeal, this Court ordered supplemental briefing on whether plaintiff's communication with her attorney amounted to a "report" under the WPA. I conclude that this communication is not a "report" based on the plain and ordinary meaning of that verb, particularly when it is considered within the context of the WPA and the sui generis nature of the attorney-client relationship. Accordingly, I would reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for further proceedings.

I. FACTS AND PROCEEDINGS

Plaintiff Tammy McNeill-Marks began working for defendant MidMichigan Medical Center-Gratiot (MMCG) in February 2012. Prior to this time, plaintiff had adopted two children and had a third child placed in her custody. Each child has the same biological mother: Sandi Freeze, plaintiff's second cousin. Marcia Fields, Freeze's mother and the chil-

[1] MCL 15.361 *et seq*.

[2] 1980 PA 469, title.

dren's biological grandmother, suffers from several psychiatric disorders. After plaintiff took custody of the children, Fields began a pattern of threatening conduct toward plaintiff, which included threats to kill her and her adopted and biological children. This behavior led plaintiff to seek multiple PPOs against Fields.

On January 14, 2013, the Gratiot Circuit Court entered an amended PPO that prohibited Fields from engaging in "stalking" as defined in MCL 750.411h and MCL 750.411i. Fields continued to violate the PPO. On December 27, 2013, plaintiff filed a motion through her attorney, Richard Gay, to extend the PPO. The circuit court granted the motion ex parte. The PPO prohibited the same conduct as the previous PPO and remained in effect until December 31, 2014.

While at work on January 13, 2014, plaintiff unexpectedly encountered Fields at MMCG. Plaintiff said "hello" to a then-unknown person being transported down a hallway in a wheelchair. The person responded, "Hello, Tammy" in what plaintiff described as "[a] little sing-songy voice" that plaintiff immediately recognized as Fields's voice. Plaintiff testified that she did not know Fields was an inpatient at that time. There was no further interaction between plaintiff and Fields at MMCG.

Plaintiff called her attorney, Richard Gay, after her encounter with Fields. Plaintiff testified that she was only returning a missed call from Gay from over the weekend. Plaintiff told Gay that "[Fields] showed up today at my workplace." According to plaintiff, she did not tell Gay whether Fields was a patient at the hospital. Likewise, plaintiff expressly told Gay not to serve Fields with the PPO at MMCG because she had previously been told by Fields's daughter at a funeral that Fields was "really, really ill" and would require heart surgery, which was also confirmed in her family members' Facebook posts.

Nevertheless, later that evening Fields was served with the PPO at MMCG. According to plaintiff and Gay, Fields was served at MMCG as a matter of coincidence that bore no connection with plaintiff's encounter with Fields earlier that day. Apparently, Gay's secretary happened to be at MMCG visiting another patient when she saw Fields there. Gay's secretary had informed her boyfriend, Gay's process server, about Fields's presence at MMCG. Gay's process server went to MMCG, asked for and received Fields's room number, and then served her with the PPO in her hospital room.

Fields reported the incident to defendant as a suspected violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[3] In reaction to Fields's HIPAA complaint, defendant began an investigation into plaintiff's conduct. Following defendant's investigation, its privacy officer concluded that plaintiff had violated HIPAA and defendant's internal privacy policies by "disclos[ing] that the patient [Fields] was . . . at the hospital," which was "protected health information." Plaintiff was terminated on February 14, 2014. The "Corrective Action and Disciplinary Form" cited plaintiff's telephone conversation

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[3] HIPAA is codified at 29 USC 1181 *et seq*., 42 USC 300gg, and 42 USC 1320d *et seq*.

with Gay as a "severe breach of confidentiality and violation[] of HIPAA privacy/practices" and as the reason for her termination.

Plaintiff brought the instant action against defendant, claiming that her termination violated the WPA and Michigan public policy. Following discovery, defendant moved for summary disposition under MCR 2.116(C)(10). The trial court granted defendant summary disposition as to both claims. With regard to the WPA claim, the trial court ruled in part that plaintiff's conversation with her attorney was not a report to a public body.[4] The trial court also ruled that plaintiff failed to demonstrate that defendant requested her to conceal or hide the existence of a crime in violation of public policy. Plaintiff appealed.

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[4] The trial court also concluded that plaintiff could not reasonably have believed that her contact with Fields constituted a violation of the PPO.

In addition, in rebuttal to plaintiff counsel's argument at the motion for summary disposition hearing, defense counsel argued in part that:

> Your Honor, let's go back . . . a minute to what plaintiff told [defendant] she told her attorney, because I hear opposing counsel now trying to make the argument that the plaintiff's conversation with her attorney was something about contacting the court to enforce the PPO or something along those lines, that's entirely untrue and that's not consistent with plaintiff's testimony at all. What plaintiff told [defendant] with regard to that patient is, number one, that the patient was at the medical center. She also told her attorney that the patient was really sick and the rumor was she might not live, in that same conversation. And she also told her attorney, don't even bother serving the PPO, because I don't even know if I want to serve it any more. And she told [defendant] all of that. Somehow this conversation is now being twisted into something that's about enforcing a PPO and contacting the Court, etcetera, that is not how things happened at all. And, in fact, something like two days after plaintiff's conversation with her attorney, they did file a motion for contempt and nowhere in the motion for contempt is there even any mention of this encounter at Gratiot at all. That telephone conversation had nothing to do with serving—she—she told her lawyer, don't even bother serving it. It had nothing to do with reporting a violation of the law. It had nothing to do with enforcing the PPO. She just wanted—she had a conversation with her lawyer and she wanted to tell her lawyer that that woman was at the hospital. And based on the information she gave [defendant], [defendant] understood her to be saying that she told her lawyer, Marcia Fields was a patient at the hospital.

The Court of Appeals reversed the trial court's ruling regarding the WPA violation and remanded for further proceedings.[5] The panel held that plaintiff's phone call with attorney Gay regarding her encounter with Fields was a report to a public body and thus a protected activity under the WPA. The panel specifically stated that plaintiff's attorney, as a member of the State Bar of Michigan (SBM), was a member of a "public body" under MCL 15.361(d)(*iv*). The panel thus concluded that plaintiff presented sufficient evidence to establish a prima facie case under the WPA.[6] Defendant sought leave to appeal in this Court. We directed the Clerk of this Court to schedule oral argument on whether to grant the application or take other action.[7] Following oral argument on the application for leave to appeal, we directed the parties to file additional supplemental briefs addressing the following issues:

> [W]hether the communication from the plaintiff to her attorney regarding Marcia Fields's presence at MidMichigan Medical Center-Gratiot amounted to a "report," as that word is used in Section 2 of the Whistleblowers Protection Act (WPA), MCL 15.362. In answering this question, the parties shall, at a minimum, address whether: (1) the plaintiff's communication must be to an individual with the authority to address the alleged violation of law; (2) the WPA requires that a plaintiff employee specifically intend to make a charge of a violation or suspected violation of law against another; and (3) privileged communications between a client and his or her attorney can constitute a report under the WPA.[8]

II. STANDARD OF REVIEW

The interpretation of the WPA presents a statutory question that this Court reviews de novo.[9] We also review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10).[10]

In deciding the motion, the trial court ostensibly rejected plaintiff's claim that her conversation with her attorney was "clear and convincing evidence" that plaintiff was "about to report" a violation to a court. See MCL 15.363(4).

[5] *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 6 (2016).

[6] With regard to plaintiff's public-policy claim, the panel held that because this claim arose out of the same activity as her WPA claim, the WPA preempted the public-policy claim.

[7] *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 500 Mich 931 (2017).

[8] *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 500 Mich 1031 (2017).

[9] *Pace v Edel-Harrelson*, 499 Mich 1, 5 (2016).

[10] *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5 (2016).

III. ANALYSIS

The WPA states, in pertinent part:

> An employer shall not discharge . . . an employee . . . because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body . . . .[11]

MCL 15.361(d) broadly defines the phrase "public body" as follows:

> (d) "Public body" means all of the following:
>
> (*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.
>
> (*ii*) An agency, board, commission, council, member, or employee of the legislative branch of state government.
>
> (*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.
>
> (*iv*) *Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body*.
>
> (*v*) A law enforcement agency or any member or employee of a law enforcement agency.
>
> (*vi*) The judiciary and any member or employee of the judiciary.[12]

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[11] MCL 15.362. This Court has observed that a plaintiff employee must demonstrate the following to make a prima facie case that his or her defendant employer has violated the WPA:

> (1) The employee was engaged in one of the protected activities listed in the provision[;]
>
> (2) the employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment[; and]
>
> (3) A causal connection exists between the employee's protected activity and the employer's act of discharging, threatening, or otherwise discriminating against the employee. [*Wurtz v Beecher Metro Dist*, 495 Mich 242, 251-252 (2014).]

[12] Emphasis added.

The Court of Appeals relied on Subparagraph (*iv*) to conclude that the SBM is a "public body" under the WPA. The panel then concluded that plaintiff's attorney, as a mandatory member of the SBM, is a member of a "public body." Assuming without deciding that plaintiff's attorney is a member of a "public body" under MCL 15.361(d)(*iv*),[13] this

[13] Defendant also argues that the SBM is not a "public body" under MCL 15.361(d)(*iv*). The definition of "public body" under MCL 15.361(d) must be read as a whole. Subparagraph (*i*) focuses on Michigan's executive branch. Subparagraph (*ii*) focuses on Michigan's legislative branch. Subparagraph (*iii*) applies to the municipalities and other local units of Michigan government. The first three subparagraphs focus on two of our three branches of state government (legislative and executive) along with reference to local government. Subparagraph (*iv*) is a catch-all definition. The use of a catch-all suggests that the *ejusdem generis* canon applies—where a general term follows a series of specific terms, the general term is interpreted "to include only things of the same kind, class, character, or nature as those specifically enumerated." *Neal v Wilkes*, 470 Mich 661, 669 (2004) (quotation marks and citation omitted).

The placement of Subparagraph (*iv*) within MCL 15.361(d) is significant. Subparagraph (*iv*)'s position is fourth of six enumerated subparts that define "public body." The Legislature's placement of Subparagraph (*iv*) demonstrates that "[a]ny other body" must be read in association with the preceding three subparagraphs. Further, because the catch-all provision is placed before the references in the final two subparagraphs to the judiciary and law enforcement agencies, the catch-all must be read as specifically not applying to either law enforcement agencies or the judiciary. This placement is presumed intentional.

Assessing the similar association among the definitions of "public body" in Subparagraphs (*i*) through (*iii*) is not an easy task. It may be argued that the public bodies referenced in Subparagraphs (*i*) through (*iii*) are state-created government entities or agencies whose primary purpose is the execution of government functions traditionally performed by state or local government, exclusive of law enforcement agencies and the judiciary. The SBM is seemingly not such an entity.

The SBM does not perform traditional government functions. The SBM's mission is to promote and improve the legal profession in Michigan. These functions have a tangential beneficial impact on the general public and the administration of justice; however, they primarily pertain to legal services and the attorneys performing those legal services, which is traditionally a private endeavor related to the legal profession. Furthermore, a common thread among state or state-created

Court must consider whether plaintiff's communication with her private attorney was "reporting" under the WPA.

A. "REPORT" UNDER THE WPA

Statutory interpretation begins with an examination of the statutory text.[14] We give the words used in a statute their ordinary meaning, unless the statute specifically defines a given term.[15] When a statutory definition is provided, that definition controls over any ordinary or plain meaning that may otherwise apply to the term or phrase defined by statute.[16] "The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written."[17] "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."[18] When engaging in statutory interpretation, courts must construe the text as a whole.[19]

A statutory term or phrase cannot be read in isolation, but must be construed in accordance with the surrounding text and statutory scheme.[20] The WPA prohibits an employer from firing an employee "because the employee, or a person acting on behalf of the employee, *reports or is about to report* . . . a violation or a suspected violation of a

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government entities or agencies is that their activities are generally undertaken via public employees. The SBM is not a public employer. SBM employees are not paid through any government funding, but are paid from annual dues collected from licensed attorneys. Executive officers of the SBM also do not receive compensation for their services. Thus, a persuasive argument can be made that the SBM is not a "public body" under the WPA.

[14] *Lash v Traverse City*, 479 Mich 180, 187 (2007).

[15] MCL 8.3a; *People v Peals*, 476 Mich 636, 641 (2006).

[16] *Ligons v Crittenton Hosp*, 490 Mich 61, 81 (2011).

[17] *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594 (2002).

[18] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63 (2002).

[19] *Sweatt v Dep't of Corrections*, 468 Mich 172, 179 (2003) (opinion by MARKMAN, J.); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167 ("Perhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

[20] *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217, 232 (2004).

law . . . to a public body . . . ."[21] The subject of this dependent clause is the whistleblower employee[22] or "a person acting on behalf of the employee" (discussed more below). At issue here, the Legislature uses the term "report" as a transitive verb, which means something must be reported.[23] That something—a direct object—is "a violation or suspected violation of a law" (for short, the "illegality"). The illegality, as a direct object, provides meaning to the verb "report." The receiver of the reported illegality—an indirect object—is a "public body" defined under MCL 15.361(d). The Legislature's express designation of a "public body" as the receiver of the reported illegality presumes that the governmental entity can address or cure the illegality through some governmental function.

The term "report" is undefined in the WPA and, accordingly, must be interpreted in light of its context within the WPA. If a statute does not define a term, it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the term.[24] The term "report"—like most words in the English language—is polysemous. For illustration, a dictionary contemporaneous with the WPA's enactment provides 13 definitions of the verb "report" (both transitive and intransitive).[25] The multitude of meanings for "report" underscores the importance of reading "report" in the context of the WPA. Reading the WPA as a whole, the most pertinent definitions of the verb "report" are "to

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[21] MCL 15.362 (emphasis added).

[22] A "whistleblower" is "[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency," *Black's Law Dictionary* (10th ed), or "one who reveals something covert or who informs against another," *Merriam-Webster's Collegiate Dictionary* (11th ed).

[23] A "transitive verb" is "[a] verb that requires a direct object to complete its meaning[.]" Strunk & White, *The Elements of Style* (4th ed), p 95. "A verb that requires an object to express a complete thought; the verb indicating what action the subject exerts on the object." Garner, *Garner's Modern American Usage* (New York: Oxford University Press, 2009), p 922.

[24] *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529 (2015).

[25] See *Webster's New Twentieth Century Dictionary: Unabridged* (1979). Most definitions of the verb "report" are clearly not applicable here. For example, "report" is broadly defined as "to give an account of, often at regular intervals; to give information about, as something seen or investigated; to say" or "to carry and repeat (a message, etc.)." The term "report" also applies specifically to the media, such as "to write an account of for presentation to others or for publication, as in a newspaper" or "to tell or relate from one to another; to circulate publicly, as a story . . . ." *Id*.

denounce to a person in authority"[26] or "to make a charge of misconduct against."[27] These definitions comport with the sentence structure of MCL 15.362: the whistleblower employee (subject) must *report* (transitive verb) an illegality (direct object) to a public body (indirect object). Thus, the ordinary meaning of "report" under the WPA requires that the whistleblower employee intend to denounce an illegality or make a charge of misconduct to a "public body."

The Court of Appeals failed to give meaning to the term "report" under the WPA. The panel assumed that plaintiff's communication with her attorney was reporting. "It is undisputed that Gay was a licensed Michigan attorney and a member in good standing of the [SBM] when plaintiff called him and reported her contact with Fields."[28] But an employee that simply *communicates* an illegality to a person falling under the broad definition of "public body" has not engaged in protected activity under the WPA. Giving the term "report" such broad meaning would ignore the textual requirements for a protected activity and would not further the purported purposes of the WPA. The WPA contains no textual basis for adopting the broadest definition for the undefined term "report."[29]

Other Court of Appeals panels have properly given meaning to "report" under the WPA. In *Henry v Detroit*,[30] the Detroit Police Department formed a review board to investigate the highly publicized death of Malice Green. The department's internal policy defined the role and obligations of the board, but the police chief gave orders effectively precluding the board from performing its obligations. The plaintiff police commander gave deposition testimony in a civil suit brought by another officer that the board was not allowed to perform its obligations. Shortly thereafter, the plaintiff was given the "choice" of either a demotion or taking an early retirement. The plaintiff brought a WPA action against the city and the police chief, in which the jury found that the defendants had retaliated against the plaintiff for his deposition testimony. The *Henry* panel, characterizing the plaintiff as a "type 1 whistleblower,"[31] stated: "On the basis of the plain language of the WPA,

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[26] *Webster's New Twentieth Century Dictionary: Unabridged* (1979).

[27] *Webster's Ninth New Collegiate Dictionary* (1983).

[28] *McNeill-Marks*, 316 Mich App at 22.

[29] Plaintiff's counsel at oral argument on the application argued that when the Legislature does not define a term, courts must read the term in its broadest possible sense. I firmly reject this argument because it ignores that courts must construe text as a whole and give meaning to undefined terms at issue in context of the statutory language. "We do not . . . construe the meaning of statutory terms in a vacuum." *Tyler v Cain*, 533 US 656, 662 (2001).

[30] *Henry v Detroit*, 234 Mich App 405, 407 (1999).

[31] Michigan WPA jurisprudence often characterizes the whistleblower employee as either a "type 1" or "type 2" whistleblower depending on the

we interpret a type 1 whistleblower to be one who, on his own initiative, takes it upon himself to communicate the employer's wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the violation. In other words, we see type 1 whistleblowers as initiators . . . ."[32] The panel held that the plaintiff's deposition testimony was not a report because the plaintiff "took no initiative to communicate the violation to a public body" and "was deposed in a private civil suit previously filed by a fellow officer."[33]

Another illustrative case is *Hays v Lutheran Social Servs of Mich*.[34] The plaintiff employee worked as a home-healthcare provider. During her work, the plaintiff encountered a client who smoked marijuana in his home and within her presence. The plaintiff called the police inquiring about potential criminal consequences of failing to disclose another person's illegal drug use. When the police asked if she wanted to take any action, the plaintiff declined to do so. She was subsequently fired by her employer for violating her client confidentiality agreement. The *Hays* panel held that the plaintiff's communication with the police was not "reporting" under the WPA. The panel used the dictionary definition of the noun "report," which is " 'a detailed account of an event, situation, etc., [usually] based on observation or inquiry.' "[35] The panel analyzed the plaintiff's communication as follows:

> [P]laintiff called the . . . officer to inquire about her potential liability if Client A's behavior was discovered, not to report any illegal behavior. Plaintiff did not provide any particulars or otherwise convey information that could have assisted the . . . officer in actually investigating any wrongdoing. There is no evidence that plaintiff identified herself, Client A, or Client A's location, nor did she provide any sort of detailed account of the situation. She did not even appear to specify the type of "illegal drugs" at issue. Thus, rather than providing a "detailed account of

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alleged protected activity. These distinctions may be helpful shorthand, but courts must always return to the express language under MCL 15.362. See *Wurtz*, 495 Mich at 251 n 14 (discussing the danger of courts relying on the judicially created term "adverse employment action" for WPA claims).

[32] *Henry*, 234 Mich App at 410.

[33] *Id*. at 411.

[34] *Hays v Lutheran Social Servs of Mich*, 300 Mich App 54 (2013).

[35] *Hays*, 300 Mich App at 59, quoting *Random House Webster's College Dictionary* (2005), and citing *People v Holley*, 480 Mich 222, 228 (2008) (holding that the prosecutor need not prove beyond a reasonable doubt that the crime sought to be reported was attempted or committed by another person in order to obtain a conviction for preventing or attempting to prevent the report of a crime under MCL 750.483a(1)(b)).

an event, situation, etc.," plaintiff was merely seeking to obtain information and advice. [*Hays*, 300 Mich App at 60.]

Although it erred by using the nounal definition of "report," the panel correctly examined the meaning of "report." Specifically, the panel understood that a whistleblower employee's communication with a public body is not enough for reporting an illegality under the WPA. These illustrative cases support my conclusion that "report" under the WPA requires that the whistleblower employee intend to denounce an illegality or make a charge of misconduct to a "public body."

B. APPLICATION TO PLAINTIFF'S PRIVATE ATTORNEY

I now consider whether plaintiff's communication with her private attorney was "reporting" under the WPA. The facts are particularly unique as the sole communication at issue involves an attorney-client communication. Plaintiff relies on the phone call with attorney Gay regarding her encounter with Fields at MMCG as her alleged protected activity.[36] This communication was defendant's stated reason for firing plaintiff. The Court of Appeals failed to appreciate the sui generis nature of the attorney-client relationship, specifically within the WPA context.

The WPA expressly allows "a person acting on behalf of the employee" to report an illegality.[37] A whistleblower employee alleging that she was about to report an illegality must show by "clear and convincing evidence that . . . she *or a person acting on . . . her behalf* was about to

[36] Plaintiff alleged in her complaint that having her attorney report on her behalf Fields's alleged violation of the PPO to the Gratiot Circuit Court was a protected activity under the WPA. Plaintiff made this argument in her appellant brief before the Court of Appeals. The Court of Appeals declined to rule on this issue, finding that plaintiff's communication with her private attorney was a protected activity. Plaintiff has not appealed this ruling or otherwise pursued this argument before this Court, and thus, plaintiff has abandoned such argument. I nevertheless would reject plaintiff's argument that she reported or was about to report the alleged violation of the PPO by filing in the circuit court. Plaintiff's motion for contempt, filed three days after her encounter with Fields at MMCG, was silent regarding this alleged violation. Further, plaintiff was not fired, and did not suffer any other adverse employment action, for filing a motion in the circuit court. Plaintiff additionally cannot establish a "causal connection" between filing her motion in the circuit court and her termination. Plaintiff has argued, and the Court of Appeals agreed, that her phone call with Gay was direct evidence of her termination.

[37] MCL 15.362.

report . . . ."[38] The Legislature's inclusion of "a person acting on behalf" of the whistleblower employee sets forth an agency relationship. An agency relationship in its broadest sense includes every relation in which an agent acts for or represents a principal by his authority.[39] A "principal" is the person represented by an agent and on whose behalf the latter acts.[40] An "agent" is a person having express or implied authority to represent or act on behalf of another person, who is called his or her principal.[41] "[F]undamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to him."[42]

The whistleblower employee (principal) may satisfy the protected activity requirement by allowing her agent to report an illegality to a "public body" defined under MCL 15.361(d). This arrangement involves three actors: (1) the whistleblower employee; (2) the whistleblower's agent; and (3) a "public body." To demonstrate this protected activity, the whistleblower employee must communicate the illegality to her agent. The whistleblower's agent then, acting on behalf of the employee, must report the illegality to a "public body." Thus, a whistleblower employee's communication with her agent itself does not constitute reporting to a public body under the WPA.

The attorney-client relationship is generally governed by agency law.[43] The legal definition of "attorney" is "one who is designated to

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[38] MCL 15.363(4) (emphasis added).

[39] *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540, 557 (1998).

[40] *Stephenson v Golden (On Rehearing)*, 279 Mich 710, 734 (1937).

[41] See *Burton v Burton*, 332 Mich 326, 337 (1952), quoting *Stephenson*, 279 Mich at 734.

[42] *St Clair Intermediate*, 458 Mich at 557-558 (citations omitted).

[43] *Link v Wabash R Co*, 370 US 626, 633-634 (1962) (affirming the district court's dismissal of the action when the petitioner's lawyer failed without reasonable excuse to appear for pretrial conference and noting that "[p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent"); *New York v Hill*, 528 US 110, 114-115 (2000) (holding that defense counsel, as the defendant's agent, could waive the defendant's right to trial within a statutory period, even without the defendant's express consent); *Detroit v Whittemore*, 27 Mich 281, 286 (1873) ("The employment of counsel does not differ in its incidents, or in the rules which govern it, from the employment of an agent in any other capacity or business."); *People v Carter*, 462 Mich 206, 218 (2000) ("[T]he defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.") (quotation marks and citation omitted); *AMCO Builders & Developers, Inc v Team Ace Joint Venture*,

transact business for another; a legal agent."[44] An attorney (agent) acts on behalf of the client (principal), representing the client, with consequences that bind the client. "A lawyer is an agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity."[45] In civil cases, a client is bound by an attorney's actions and omissions as long as the attorney's conduct falls within the scope of the attorney's authority.[46] An attorney acting outside the scope of his authority may open himself up to civil liability and professional sanctions. Agency law imparts many duties that an agent owes a principal. But attorneys are held to a higher standard and thus have heightened duties compared to the ordinary agent.[47] One of the fundamental, heightened duties for an attorney is protecting a client's confidential information.

Rules for client confidentiality derive from professional regulations, the attorney-client privilege, and the work-product doctrine.[48] "The professional right and duty to preserve client confidences is a distinctive feature of the lawyer's function."[49] The Michigan Rules of Professional Conduct (MRPC) provide great protection for a client's or a prospective

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469 Mich 90, 103 (2003) (YOUNG, J., concurring) ("The attorney-client relationship is generally governed by principles of agency."); *People v Dendel*, 481 Mich 114, 137 (2008) (CORRIGAN, J., concurring) ("[L]awyers are *agents*, after all . . . .") (quotation marks and citation omitted).

[44] *Black's Law Dictionary* (10th ed); see also *Fletcher v Bd of Ed of Sch Dist Fractional No 5*, 323 Mich 343, 348 (1948).

[45] 1 Restatement Law Governing Lawyers, 3d, Introductory Note, p 124; see also Restatement Agency, 2d, § 14, comment *b*, p 60 (characterizing lawyers as "recognized agents").

[46] See *Everett v Everett*, 319 Mich 475, 482-483 (1947).

[47] See, e.g., DeMott, *The Lawyer as Agent*, 67 Fordham L Rev 301 (1998) (opining that the agency law principles are the starting point for analyzing the full legal consequences of attorney-client relationships).

[48] MRPC 1.6, comment ("The principle of confidentiality is given effect in two related bodies of law, the client-lawyer privilege (which includes the work-product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics."). The work-product doctrine is not applicable here because plaintiff's phone call to attorney Gay was not "notes, working papers, memoranda or similar materials" prepared in anticipation of litigation. *D'Alessandro Contracting Group, LLC v Wright*, 308 Mich App 71, 77 (2014) (quotation marks and citation omitted).

[49] 1 Hazard, Jr. & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (Prentice Hall Law & Business, 2d ed), § 1.6:102.

client's communications with an attorney.[50] Thus, an attorney is prohibited from disclosing confidential information except as authorized by law or required under the MRPC. An attorney's duty of confidentiality continues even after the attorney-client relationship has terminated.[51] "A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority."[52]

Consistent with the MRPC, the attorney-client privilege protects confidential client communications. The attorney-client privilege is one of the oldest and well-recognized privileges for confidential communications.[53] Michigan jurisprudence has long recognized the common-law attorney-client privilege.[54] The attorney-client privilege protects confidential communications between a client and her attorney made for the purpose of obtaining or giving legal advice.[55] "The purpose of the attorney-client privilege is to foster open communications between attorney and client. The privilege is personal to the client and cannot be

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[50] "[A] lawyer shall not knowingly: reveal a confidence or secret of a client; use a confidence or secret of a client to the disadvantage of the client; or use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure." MRPC 1.6(b) (subpart numbers omitted). MRPC 1.6(a) defines "confidence" as "information protected by the client-lawyer privilege under applicable law" and defines "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

[51] MRPC 1.9.

[52] MRPC 1.6, comment.

[53] *Upjohn Co v United States*, 449 US 383, 389 (1981).

[54] *Passmore v Passmore Estate*, 50 Mich 626, 627 (1883) ("There is a privilege of secrecy as to what passes between attorney and client, but it is the privilege of the client and he may waive it if he so chooses. It is not the privilege of the court or of any third party.") (citations omitted); *Grand Rapids Trust Co v Bellows*, 224 Mich 504, 510-511 (1923) ("Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor, except the client waives the protection.") (quotation marks and citation omitted).

[55] See *In re Adams*, 494 Mich 162, 174 n 12 (2013), quoting *Schaibly v Vinton*, 338 Mich 191, 196 (1953), and *Alderman v People*, 4 Mich 414, 423 (1857).

waived by the attorney without the client's permission."[56] The Michigan Rules of Evidence provide for the attorney-client privilege.[57] The Legislature has expressly provided for the privilege in criminal proceedings.[58] The Supreme Court of the United States has recognized the common-law understanding that the attorney-client privilege survives the client's death.[59] In sum, the attorney-client privilege provides great protection for a client's confidential communications, unlike ordinary disclosures. For this reason, I cannot conclude that a whistleblower employee's communication with her agent itself constitutes reporting to a public body under the WPA.

The Court of Appeals failed to consider whether plaintiff's phone call with attorney Gay was a privileged communication. A privileged communication between a client and her private attorney cannot mean "reporting" to a public body under the WPA. There must be a waiver of the attorney-client privilege. As stated, the privilege belongs to the client, and thus the client must waive the privilege unless the law provides otherwise. The client may either expressly waive her privilege or implicitly waive her privilege through her conduct. Further, even if the client waives her privilege and consents to disclosing the confidential communication, the attorney's remedial actions are no different from the client under the WPA. The attorney must still *report* an illegality to a "public body" under the WPA. No matter the attorney's role as "an officer of the court," the private attorney must act as his client's agent within the scope of his authority. Such reasoning is consistent with the Legislature's express provision that "a person acting on behalf of the employee" may report an illegality for the whistleblower employee. For these reasons, privileged communications between a client and her private attorney do not constitute reporting under the WPA.[60]

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[56] *People v Nash*, 418 Mich 196, 219 (1983) (opinion by BRICKLEY, J.) (citation omitted).

[57] MRE 501 ("Privilege is governed by the common law, except as modified by statute or court rule.").

[58] See MCL 767.5a(2) ("Any communications between attorneys and their clients . . . are hereby declared to be privileged and confidential when those communications were necessary to enable the attorneys . . . to serve as such attorney . . . .").

[59] *Swidler & Berlin v United States*, 524 US 399, 405 (1998).

[60] Plaintiff argues that she waived her attorney-client privilege, and thus her phone call with Gay was not a privileged communication. Plaintiff points to the deposition testimony of defendant's director of nursing, Brenda Whitman, arguing that she shared her confidential communications with Whitman. Plaintiff also argues that defendant was made aware of the phone call with Gay because she waived her attorney-client privilege. Plaintiff's claim of waiver misses the mark. The facts demonstrate that defendant was made aware of plaintiff's

In this case, plaintiff's communication with her private attorney was not "reporting" under the WPA. There is no dispute that plaintiff and attorney Richard Gay had an attorney-client relationship, and thus an agency relationship. Plaintiff admits that she did not want Gay to act upon the alleged illegality—Fields's presence at MMCG in violation of the PPO. Plaintiff testified in the form of deposition testimony that she expressly told Gay "not to serve [Fields] . . . because she was so ill . . . ."[61] When asked whether she told Gay "[l]et's not serve [Fields] because she's really sick, and the rumor is she might not live," plaintiff answered in the affirmative. Plaintiff further stated that she called Gay because her "intent was to return his phone call, one; and, two, to tell her [sic] that [Fields] had violated the personal protective order one more time." Moreover, plaintiff's motion seeking to hold Fields in contempt for violating the PPO was silent regarding her encounter with Fields at MMCG. The facts clearly demonstrate that plaintiff did not want Gay to take any action upon the illegality. Plaintiff's phone call with Gay was a privileged communication made under the attorney-client relationship; therefore, Gay had no authority to disclose that communication without plaintiff's consent. Thus, when communicating with her private attorney, plaintiff did not intend to denounce an illegality or make a charge of misconduct to a "public body." For these reasons, I conclude that plaintiff's communication with her private attorney was not "reporting" under the WPA.

Plaintiff's reliance on *Brown v Mayor of Detroit*[62] is misplaced. In *Brown*, two Detroit police officers reported illegalities committed by fellow officers and the mayor of Detroit. The whistleblower officers reported these illegalities to their superiors within the department. We held that the WPA does not require that an employee of a "public body" report illegalities to an outside agency or higher authority, and we also held that there is no requirement that an employee who reports an illegality receives WPA protections only if reporting is outside the employee's job duties. My position is wholly consistent with *Brown*. First, *Brown* did not give meaning to the term "report" under the WPA, but rejected nontextual requirements for the definition of "public body" under MCL 15.361(d). A whistleblower employee may still intend to denounce an illegality or make a charge of misconduct by reporting to a superior, assuming the superior meets the "public body" definition. The employee nevertheless must still *report* to demonstrate such protected activity. Second, like in *Brown*, the meaning of "report" under the WPA does not vary depending on the employee's specific job duties. Protection

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phone call with Gay after Fields's HIPAA complaint and through the subsequent privacy investigation. Thus, plaintiff's communications with Gay were privileged until at least the time of the disclosure. That plaintiff subsequently waived the attorney-client privilege does not mean that the privilege was void *ab initio*.

[61] See Part I of this statement.

[62] *Brown v Mayor of Detroit*, 478 Mich 589 (2007).

under the WPA is not dictated by the employee's position or job requirements. Thus, *Brown* does not support plaintiff's claim.[63]

In sum, plaintiff's communication with her private attorney was not "reporting" under the WPA because plaintiff did not intend to denounce an illegality or make a charge of misconduct to a "public body."

IV. STATEMENT TO THE LEGISLATURE

Although I would resolve this case on the meaning of "report" as that term is used in the WPA, I strongly encourage the Legislature to reexamine this inartfully drafted statute, particularly the "public body" definition under MCL 15.361(d).[64] The statutory definition of "public body" is extremely expansive and may well exceed the scope of entities the Legislature intended to include as an entity or organization suitable to field a report of suspected illegal activity. For example, MCL 15.361(d)(*vi*) clearly provides that a report to "[t]he judiciary [or] any member or employee of the judiciary" is a report to a "public body" under the WPA. This provision fails to take into account the unique role of the judiciary as impartial arbiters of the law and the fact that the judiciary

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[63] Plaintiff also relies on *Whitman v City of Burton*, 493 Mich 303 (2013), which held that an employee's motivation is not relevant as to whether the employee has engaged in a protected activity and that proof of primary motivation is not a prerequisite to bringing a claim. My position is consistent with *Whitman*. A whistleblower employee's motivation for reporting is not the same as the employee's intent to denounce an illegality or make a charge of misconduct to a "public body." Put simply, motivation and intent are not synonymous. "While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial." *Black's Law Dictionary* (10th ed). The whistleblower employee's subjective reasoning for engaging in a protected activity is irrelevant for a WPA claim. Thus, plaintiff erroneously relies upon *Whitman*.

[64] The Legislature currently has a bill pending before the Michigan Senate that would amend the WPA, effectively broadening the scope of whistleblower protection. See 2017 SB 789. Senate Bill 789 would allow for a whistleblower employee to report a violation or suspected violation of law to: an amended definition of "public body" under MCL 15.361(d); "the press"; or the "state employee ombudsman" as defined under proposed MCL 15.361(e). The "state employee ombudsman" would be defined in reference to a new legislative appointed position under the proposed State Employee Ombudsman Act. See 2017 SB 788. I, of course, take no stance on pending legislation, but my position in this statement should highlight the concerns with an extremely expansive WPA.

cannot act in the absence of a case or controversy properly filed before the Court. How are the purported purposes of the WPA advanced if, in the course of exercising the judicial function, a judge learns that a witness observed what was perceived to be a violation of law? More striking is the notion that a report can be made to any employee of the judiciary. Did the Legislature truly intend for the reporting requirement of the WPA to be satisfied when a person reports or is about to report a suspected violation of law to a court reporter employed in any one of the many trial courts throughout Michigan? The clear and unambiguous language of the WPA suggests the answer is yes. Similarly, I question whether the Legislature considered the vast implications of including in the exceedingly broad definition of "public body" all agents, boards, commissions, councils, and employees of the legislative and executive branches of government. If this is not what the Legislature intended, it would be well served to consider amending the definition of "public body" under the WPA.

V. CONCLUSION

For these reasons, I respectfully dissent from the majority's order denying leave in this case. I conclude that plaintiff's communication with her private attorney was not "reporting" to a public body under the WPA. This conclusion is required by the ordinary meaning of the verb "report" within the WPA context and the sui generis nature of the attorney-client relationship. Accordingly, I would reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for consideration of the merits of plaintiff's claim of termination against public policy.[65]

MARKMAN, C.J., joined the statement of ZAHRA, J.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

BOARD OF TRUSTEES OF THE CITY OF PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE TRUST v CITY OF PONTIAC, No. 154745; reported below: 317 Mich App 570. On January 10, 2018, the Court heard oral argument on the application for leave to appeal the October 25, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied.

MCCORMACK, J. (*concurring*). Retroactive laws are often unfair. They upset settled expectations, impose new burdens, and disrupt old agreements. And so we presume laws are prospective unless they say otherwise in very clear terms. The Court of Appeals reaffirmed this foundational principle, and we rightly leave its work in place.

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[65] *Pace*, 499 Mich at 10 n 19 (" '[I]f the WPA does not apply, it provides no remedy and there is no preemption.' "), quoting *Anzaldua v Neogen Corp*, 292 Mich App 626, 631 (2011).

The Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust (the Trust) was organized to pay the healthcare benefits of retired police and firefighters. Under the agreement, the city of Pontiac made retirement benefit payments. But in 2012, the city came under the control of an emergency manager, and after following the necessary steps, the emergency manager issued Executive Order 225 on August 1, 2012. Order 225 read in relevant part:

> Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations.
>
> The Order shall have immediate effect.

As a result, the city stopped contributing to the retirement trust fund, and the Trust sued. The only question for us is whether Order 225 has retroactive effect. If the order is retroactive, the city would not need to make contributions for the period from 2011 to the date the order issued, August 1, 2012. If the order is not retroactive, the city must make the contributions that accrued up until that date. Several million dollars hang in the balance.

Following a lengthy procedural journey, the Court of Appeals held that *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014), in which we clarified the test for determining the retroactivity of statutes, governs the analysis of whether an executive order has retroactive effect. Applying that framework, the panel held that Order 225 should not be given retroactive effect. I see no flaw in the panel's work; our decision today to deny leave is appropriate.

The rules of statutory interpretation about retroactivity are settled and sound. When determining whether a statute should be given retroactive effect we look first to legislative intent, *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583 (2001), and the plain text of the statute is our starting place, *Madugula v Taub*, 496 Mich 685, 696 (2014).[1] *LaFontaine* created a four-part framework to determine the retroactivity of statutes, and two parts are particularly salient: we must consider whether (1) there is specific language providing for retroactive application, and whether (2) retroactivity would impair vested rights or create new obligations. *LaFontaine*, 496 Mich at 38-39. Although *LaFontaine*'s four-part framework was new, its requirement that the Legislature must speak with clarity to make a law retroactive is a traditional rule of statutory interpretation. *Harrison v Metz*, 17 Mich 377, 382 (1868) ("[I]t is a sound rule of statutory construction that legislation is to have a prospective operation only, except where the

[1] The city agreed that we should look at the plain text of Order 225 to determine the emergency manager's intent in its original application brief before this Court. See Defendant's June 4, 2015 Application for Leave to Appeal, pp 20-21.

contrary intent is expressly declared or is necessarily to be implied from the terms employed."). See also *Murray v Gibson*, 56 US 421, 423 (1853).

There is no compelling reason to treat executive orders differently for retroactivity analysis. An executive order is quasi-legislative and should be interpreted with the same approach used to interpret a statute. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 756-757 (1982); *Aguirre v Dep't of Corrections*, 307 Mich App 315, 321 (2014). And emergency managers derive their power from the Legislature, which further supports the conclusion that the same rules should apply to determine whether their orders are retroactive. See former MCL 141.1519, as enacted by 2011 PA 4. The United States Supreme Court has held that the heightened clarity required for retroactivity applies to statutes and administrative rules alike. *Bowen v Georgetown Univ Hosp*, 488 US 204, 208 (1988).

Nothing about this conclusion is groundbreaking, as "[c]ourts have long used the same set of tools to interpret both executive orders and statutes." Newland, Note, *Executive Orders in Court*, 124 Yale L J 2026, 2069 (2015). The dissent agrees that the rules for interpreting statutes apply to interpreting executive orders. ("There is no doubt that courts must interpret an executive order using the ordinary means of statutory interpretation."). Given that, I see no principled way to exempt retroactivity analysis. The settled precedent that governs courts' interpretations of statutes provides a readily understandable set of expectations for interpreting executive orders. If we were to announce some new, yet-unspecified, set of rules to discern retroactive application of executive orders, we would be sending parties off to sea without a compass, and inviting a host of new litigation. Underlying concerns about unfairness do not change, and neither should our rules: emergency managers must clearly demonstrate their intent that an order be retroactive.

Because these same rules apply, precedent stacks the deck against finding retroactivity here. The " 'general rule is that a statute is to be construed as having a prospective operation only, unless its terms show clearly a legislative intention that its terms should operate retroactively.' " *Barber v Barber*, 327 Mich 5, 12 (1950) (collecting cases; citation omitted). This presumption of prospectivity "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v USI Film Prod*, 511 US 244, 265 (1994). And it applies even if "the words of the statute are broad enough in their literal extent to comprehend existing cases . . . unless a contrary intention is unequivocally expressed . . . ." *Todd v Boards of Election Comm'rs*, 104 Mich 474, 478-479 (1895) (quotation marks and citation omitted).

Against this backdrop, *LaFontaine* instructs courts to consider whether there is specific language providing for retroactive application. The expression of retroactive intent must be "clear, direct, and unequivocal . . . ." *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 156 (2006). The expression here is not; there is no express language signaling retroactive effect. The absence of such language is important to concluding that the order should not be retroactive. See *Frank W Lynch & Co*, 463 Mich at 583-584; *White v Gen Motors Corp*, 431 Mich 387, 398 (1988); *Van Fleet v Van Fleet*, 49 Mich 610, 613 (1883).

And the order contains a telltale forward-looking phrase: "The Order shall have immediate effect." When the Legislature provides that a law will take immediate effect, that supports a finding of textual prospectivity. *LaFontaine*, 496 Mich at 40. See also *Pohutski v City of Allen Park*, 465 Mich 675, 698 (2002); *Davis*, 272 Mich App at 157.

The Legislature, moreover, knows full well how to make laws retroactive, and the emergency manager could have used similar language if retroactivity was the goal. See, e.g., MCL 141.1157 ("This act shall be applied retroactively . . . ."); MCL 324.21301a(2) ("The liability provisions that are provided for in this part shall be given retroactive application."); MCL 224.19(2) ("The authority and powers granted in this section relative to bridges over navigable streams and the grant of that authority are retroactive . . . ."). See also *LaFontaine*, 496 Mich at 40 n 30 (noting that MCL 445.1567(1)-(2), MCL 445.1568, and MCL 445.1570 each begin with the preface "Notwithstanding any agreement" as a sign they were retroactive). Any of these phrases would show retroactive intent, but none were used. Nor does the language of Order 225 give rise to a "necessary, unequivocal and unavoidable implication" that the manager intended it to apply retroactively. *Briggs v Campbell, Wyant & Cannon Foundry Co*, 379 Mich 160, 165 (1967) (cleaned up). As a result, Order 225 fails to overcome the heavy presumption against retroactivity.

Whether the Legislature was clear in its *grant of authority* to the emergency manager to devise retroactive orders, as the dissent emphasizes, is beside the point. Our focus must be on the text of the executive order that abrogated the contract, not the authority to issue the order.[2] The question is not whether the emergency manager *could* have issued a retroactive order, it is whether he did.

Settled expectations matter too. Retroactive application of the order would upend the rights and obligations of those affected by it. The presumption of prospectivity is therefore especially strong "if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions." *Frank W Lynch & Co*, 463 Mich at 583. See also *Johnson v Pastoriza*, 491 Mich 417, 429 (2012); *Hansen-Snyder Co v Gen Motors Corp*, 371 Mich 480, 484 (1963).

That concern is significant here. Pontiac's police and firefighters may have spent years—or entire careers—expecting that benefits would be paid out upon retirement. The city's financial distress may support the need for drastic action, but it does not weaken the plaintiff's reliance interests. Even assuming the emergency manager had the authority to

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[2] Otherwise, there would be no need to subject the Legislature to a heighted clarity requirement. The Michigan Constitution vests the Legislature with broad legislative powers and does not limit it to prospective legislation. Const 1963, art IV, § 1. But the fact that the Legislature indisputably has authority to pass retroactive laws does not relieve it of the obligation to make its intent clear. The same principle should hold true for emergency managers.

invalidate contracts (a constitutional question not before us here), the plaintiff's reliance interests would still stand. There is a crucial difference between affecting a future source of income and taking property away.

These are central principles in our jurisprudence. "All laws should be therefore made to commence *in futuro* . . . ." 1 Blackstone, Commentaries on the Laws of England, p *46. Our own Justice COOLEY said that "[r]etrospective legislation . . . is commonly objectionable in principle, and apt to result in injustice . . . ." Cooley, Constitutional Limitations (1868), pp 62-63. Without clear language to the contrary, these critiques apply with equal force to executive orders. The Court of Appeals got this right, and for that reason, I support this Court's denial of the defendant's application for leave to appeal.

VIVIANO and BERNSTEIN, JJ., joined the statement of MCCORMACK, J.

ZAHRA, J. (*dissenting*). I respectfully dissent from the majority's order denying leave in this case. "A statute presumptively has no retroactive application. . . . As a general, almost invariable rule, a legislature makes law for the future, not for the past."[1] "Retroactive application of legislation ' "presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions." ' "[2] "We have therefore required that the Legislature make its intentions clear when it seeks to pass a law with retroactive effect."[3] This requirement, in essence, is a departure from our traditional rules of statutory interpretation that would ordinarily provide that "[w]hen a statute's language is unambiguous, 'the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No *further* judicial construction is required or permitted.' "[4] In *LaFontaine Saline, Inc v Chrysler Group, LLC*,[5] this Court provided a framework to *further* evaluate whether the Legislature clearly intended that a new law be given retroactive application. In my view, *LaFontaine* has no application to executive action implemented through executive orders. The Court has erroneously applied the *LaFontaine*

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[1] See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 261; see also 2 Singer & Singer, Sutherland Statutory Construction (7th ed), § 41:2, p 386 ("A fundamental principle of jurisprudence holds that retroactive application of new law is usually unfair.").

[2] *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38 (2014), quoting *Downriver Plaza Group v Southgate*, 444 Mich 656, 666 (1994), in turn quoting *Gen Motors Corp v Romein*, 503 US 181, 191 (1992).

[3] *LaFontaine*, 496 Mich at 38, citing *Frank W Lynch & Co v Flex Technologies*, 463 Mich 578, 583 (2001).

[4] *Madugula v Taub*, 496 Mich 685, 696 (2014), quoting *Malpass v Dep't of Treasury*, 494 Mich 237, 247-248 (2013) (emphasis added).

[5] *LaFontaine*, 496 Mich 26.

retroactivity framework to set aside the legitimate action of the emergency manager. In lieu of granting leave to appeal, I would reverse the Court of Appeals judgment and remand to the Court of Appeals to address the issues plaintiff presented in that court but were not decided.

Thirty years ago, faced with the insolvency of certain local units of government, the Legislature passed the Local Government Fiscal Responsibility Act (LGFRA),[6] which provided for the appointment of an emergency financial manager upon a determination of a financial emergency in a local unit of government. In 1990, the Legislature expanded the power of the emergency financial manager to include all matters of finances of a distressed local unit of government and extended the LGFRA to the management of insolvent public school districts.[7] Faced with the effects of the Great Recession, in 2011 the Legislature again expanded the powers of the emergency manager in the Local Government and School District Fiscal Accountability Act (LGSDFAA),[8] which provided a properly appointed emergency manager with power to declare "[t]he modification, rejection, termination, and renegotiation of contracts . . . ."[9]

In each legislative action described above, the Legislature declared, in identical or similar terms, that "the public health and welfare of the citizens of [Michigan] would be adversely affected by the insolvency of units of local government[.]"[10] In order to protect against these hazards and remedy the financial crises experienced by insolvent units of government, appointed emergency managers would implement the vast powers bestowed upon them by the state to achieve "prudent fiscal management."[11]

There is no dispute that the city of Pontiac was in financial distress and that the Governor properly appointed an emergency manager to address the financial insolvency and instability of the city. Acting pursuant to the LGSDFAA, the city's emergency manager issued Executive Order (EO) 225 on August 12, 2011, which declared, in part, that the city was no longer obligated to make contributions to the police and

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[6] 1988 PA 101, former MCL 141.1101 through MCL 141.1118.

[7] 1990 PA 72, former MCL 141.1201 through MCL 141.1244.

[8] 2011 PA 4, former MCL 141.1501 through 141.1531.

[9] Former MCL 141.1518(1)(c).

[10] Former MCL 141.1102 and former MCL 141.1202; see also former MCL 141.1503 (stating that "the health, safety, and welfare of the citizens of [Michigan] would be materially and adversely affected by the insolvency of local governments"). Public Act 436 of 2012 has since replaced former MCL 141.1501 through 141.1531, but MCL 141.1543(a) currently contains this same language as former MCL 141.1503 under the now-named Local Financial Stability and Choice Act.

[11] Former MCL 141.1102 and former MCL 141.1202. This goal was expanded in later acts to include the "efficient provision of services." See former MCL 141.1503 and current MCL 141.1543(b).

firefighters voluntary employees' beneficiary associations (VEBA), which is a trust created to provide health insurance to retired police and fire personnel. Specifically, EO 225 provided:

> [The Trust is] amended to remove [the] obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations.
>
> The Order shall have immediate effect.

Plaintiff, the board of trustees of the VEBA, contested the authority of the emergency manager to set aside the contributions to the VEBA on several grounds, and the trial court rejected them in total. Plaintiff appealed. In its March 17, 2015 published opinion, the Court of Appeals concluded that the emergency manager was authorized to retroactively modify the VEBA.[12] Nonetheless, the panel concluded that the language of EO 225 only "remove[d the contractual obligations] of the City [of Pontiac] *to continue to make* contributions to the Trust[.]"[13] Focusing on the word "continue," the panel concluded that EO 225 did not set aside the accrued amount of $3,473,923 that was past due and owing to the VEBA.[14]

The city of Pontiac sought leave to appeal in this Court, arguing that because the past due contribution had not been funded, it was an obligation included within the scope of EO 225. This Court reversed the Court of Appeals and held:

> EO 225 clearly states that, as of August 1, 2012, the [city of Pontiac] no longer has an obligation "to continue to make contributions" under Article III of the Trust Agreement. It does not differentiate between already accrued, but unpaid obligations and future obligations, and thus by its terms applies to both. Accordingly, the Court of Appeals erred by concluding that the emergency manager did not intend to extinguish the [city]'s 2011-2012 fiscal year contribution.[15]

This Court also remanded the case to the Court of Appeals to address an issue not raised or argued by plaintiff in the lower courts: whether the emergency manager's action was impermissible under the test for retroactivity set forth in *LaFontaine*. Specifically, we asked the Court of Appeals to consider, among other things: "(1) whether the retroactivity analysis stated in *LaFontaine* applies to EO 225; [and] (2) if so, whether

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[12] *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No 1*, 309 Mich App 590, 608 (2015).

[13] *Id*. at 608.

[14] *Id*. at 594, 608-609.

[15] *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac*, 499 Mich 921, 921 (2016).

the extinguishment of the defendant's accrued, but unpaid, 2011-2012 fiscal year contribution by EO 225 is permissible under *LaFontaine*[.]"[16]

On remand, the Court of Appeals held that the retroactivity analysis of *LaFontaine* applied to EO 225 and that application of EO 225 to the nearly $3.5 million past due contribution violated *LaFontaine*.[17] The city of Pontiac again sought relief in this Court, and we ordered oral argument on the application for leave to appeal.[18] Today, a majority of this Court denies the city's application for leave to appeal.

The *LaFontaine* retroactivity analysis should not apply to action taken by an emergency manager. Simply put, the emergency manager's order was not "legislative action" subject to *LaFontaine*. The Court of Appeals erroneously concluded the *LaFontaine* retroactivity analysis applies because executive orders are interpreted under the same rules of interpretation applicable to statutes, not the nontraditional rules of statutory interpretation that are designed to evaluate whether a statute applies retroactively. There is no doubt that courts must interpret an executive order using the ordinary means of statutory interpretation. This Court has stated that "[t]he use of the same rules of construction for both statutes and executive orders or administrative regulations is not illogical because executive orders and administrative regulations are both quasi-legislative in nature."[19]

But there is no justification for subjecting the plain language of executive orders to the elevated or *further* degree of certainty required for retroactive application of laws enacted by the Legislature. Here, the Michigan Legislature provided emergency managers with broad authority under the LGSDFAA, including the power to reject, amend, modify, or terminate terms of existing collective bargaining agreements. There is no dispute that this Court agreed that the language of LGSDFAA is "so clear and positive as to leave no room to doubt"[20] that the Legislature intended it to grant duly appointed emergency managers the power to set aside contractual obligations.[21] The clarity with which the Legislature declared the power of emergency managers appointed under

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[16] *Id*.

[17] *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac (On Remand)*, 317 Mich App 570, 574 (2016).

[18] *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac*, 500 Mich 1011 (2017).

[19] *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 756-767 (1982), citing 1 Sands, Sutherland Statutory Construction, p 219, and Asselin, *Executive Orders: Discretion vs Accountability*, 51 Conn Bar J 383 (1977).

[20] *Landgraf v USI Film Prod*, 511 US 244, 272 (1994).

[21] In fact, we previously agreed that the city of Pontiac's emergency manager had the power under the LGSDFAA to unilaterally amend existing collective bargaining agreements. See 499 Mich 921.

the LGSDFAA alleviates the very reason that heightened review is used to determine whether legislation is retroactive. That is, there can be no doubt that the clear, plain, and direct language of the LGSDFAA afforded the public the " 'opportunity to know what the law is and to conform their conduct accordingly . . . .' "[22] Plaintiff knew or should have known on March 16, 2011, the date the LGSDFAA became effective and more than a year before the emergency manager exercised that power in the instant case, that a properly appointed emergency manager would have the power to modify any contract. Thus, it cannot be viewed as "unsettling" for the city of Pontiac's emergency manager to have exercised power under LGSDFAA to retroactively amend existing collective bargaining agreements through EO 225. Given this understanding, EO 225 should not be subject to the elevated degree of certainty required for retroactive application of laws enacted by the Legislature. Rather, EO 225 should merely be subject to a "[c]ontemporaneous and practical interpretation."[23]

Further, I believe the Court of Appeals misconstrued this Court's ruling in *LaFontaine*. In *LaFontaine*, this Court simply provided a multi-factor test to determine whether to apply the canon of presumption against retroactivity. No *LaFontaine* principle is dispositive on whether legislation may be applied retroactively, but instead the factors are guideposts for courts reviewing the law in question. The plain language of EO 225 is ultimately the best indicator of what the emergency manager intended when issuing EO 225, rather than a court's application of the *LaFontaine* analysis. Thus, I am not convinced that *LaFontaine* applies here.

Assuming arguendo that the *LaFontaine* retroactivity framework applies to EO 225, the panel erred in concluding that retroactive application was impermissible. Preliminarily, I agree with the Court of Appeals that Principle Two does not apply under the facts and circumstances of this case. But I disagree with the Court of Appeals' conclusion that *LaFontaine* Principle Four "does not support retroactive application of EO 225 given that a vested right would be affected."[24] Principle Four is only implicated by an act that is remedial or procedural, and EO 225 is clearly substantive. Thus, I conclude that Principle Four offers little guidance, and the *LaFontaine* analysis in this case is controlled by Principles One and Three.

In regard to *LaFontaine* Principle One—"whether there is specific language providing for retroactive application"[25]—the language of EO 225 provides for retroactive application. The plain language of EO 225

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[22] *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 166; 725 NW2d 56 (2006), quoting *Landgraf*, 511 US at 265.

[23] 2B Singer & Singer, Sutherland Statutory Construction (7th ed), § 49:3, p 11.

[24] *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees*, 317 Mich App at 586.

[25] *LaFontaine*, 496 Mich at 38.

clearly states that, as of August 1, 2012, the city no longer had an obligation "to continue to make contributions" to the Trust. The order's language does not differentiate between already accrued, but unpaid obligations and future obligations, and thus expressly applies to both. This is precisely the reason this Court previously ruled that the Court of Appeals erred in concluding that the emergency manager did not intend to extinguish the defendant's FY 2011–2012 contribution.[26] Given that this Court already said EO 225 was "clear," meaning "free from obscurity or ambiguity : easily understood : UNMISTAKEABLE,"[27] requiring a greater degree of clarity for that which is already clear strikes me as not only unnecessary but an exercise in futility.

Executive orders are reviewed by the ordinary means of statutory interpretation, and *LaFontaine* does not place upon executive orders what amounts to a redundant elevated burden that they be crystal clear to apply retroactively. In regard to *LaFontaine* Principle Three—keeping in mind that retroactive legislation impairs vested rights acquired under existing laws or created new obligations or duties with respect to transactions or considerations already past—there is no doubt that the retiree's vested rights were impaired with the issuance of EO 225. But impairment of vested rights does not *per se* render retroactive application impermissible. Principle Three only requires the reviewing court to "keep in mind" that retroactive application of a law may impair vested rights.[28] And because retroactive application of EO 225 is exactly the purpose of the emergency manager's powers to amend, modify, or terminate terms of existing agreements (i.e., vested rights), I am restrained by the Legislature's determination and will not thwart its prerogative by applying an overly critical view of the very executive orders that the Legislature intended be issued.

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[26] This Court stated that

> EO 225 by its plain language expresses the intent of the emergency manager to extinguish the defendant's 2011-2012 fiscal year contribution. Although that contribution accrued on June 30, 2012, the defendant had not yet paid the obligation when EO 225 went into effect. EO 225 *clearly* states that, as of August 1, 2012, the defendant no longer has an obligation "to continue to make contributions" under Article III of the Trust Agreement. *It does not differentiate between already accrued, but unpaid obligations and future obligations, and thus by its terms applies to both.* Accordingly, the Court of Appeals erred by concluding that the emergency manager did not intend to extinguish the defendant's 2011-2012 fiscal year contribution. [*Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees*, 499 Mich at 921 (emphasis added).]

[27] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[28] *LaFontaine*, 496 Mich at 39.

Accordingly, I would reverse the Court of Appeals' decision and remand to the Court of Appeals for consideration of issues that plaintiff presented in that court but were not decided.

WILDER, J., joined the statement of ZAHRA, J.

Summary Disposition June 20, 2018:

DUBIN v FINCHER, No. 157369; Court of Appeals No. 339175. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to that court for reconsideration in light of *Marik v Marik*, 501 Mich 918 (2017), and *Royce v LaPorte*, unpublished per curiam opinion of the Court of Appeals, issued May 8, 2018 (Docket Nos. 337549 and 340354). The motion for sanctions for vexatious proceedings is denied. We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered June 20, 2018:

DORKO v DORKO, No. 156557; Court of Appeals No. 333880. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the plaintiff waived any statute of limitations defense; (2) whether *Joughin v Joughin*, 320 Mich App 380 (2017), was correctly decided; and (3) when a claim for retirement benefits under a judgment of divorce accrues. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Family Law Section of the State Bar of Michigan and the Michigan Chapter of the American Academy of Matrimonial Lawyers are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MICHIGAN ASSOCIATION OF HOME BUILDERS v CITY OF TROY, No. 156737; Court of Appeals No. 331708. The appellants shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the creation of a fee surplus generated by an enforcing agency under the Construction Code Act (CCA), MCL 125.1501 *et seq*., and the use of that surplus to pay for shortfalls in previous years by transfer of the surplus into the city's general fund, violates the constraints of § 22 that fees be reasonable, be intended to bear a reasonable relation to the cost of acts and services provided by the enforcing agency, and be used only for the

operation of the enforcing agency or the construction board of appeals, or both; (2) if so, whether appellants have a private cause of action against a governmental subdivision for enforcement of the CCA, MCL 125.1508b(1); (3) whether appellants are "taxpayers" that have standing to file suit pursuant to the Headlee Amendment, Const 1963, art 9, § 32; and (4) if so, whether the challenged fees violate the Headlee Amendment, Const 1963, art 9, § 31. In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Michigan Municipal League, the Michigan Township Association, the Government Law Section of the State Bar of Michigan, and Michigan Realtors are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 20, 2018:

CHELSEA HEALTH & WELLNESS FOUNDATION v SCIO TOWNSHIP, No. 156813; Court of Appeals No. 332483.

In re HADLEY ESTATE, No. 157143; Court of Appeals No. 332888.

PEOPLE v HARDRICK, Nos. 157204 and 157205; Court of Appeals Nos. 333568 and 333898.

Reconsideration Denied June 22, 2018:

PEOPLE v DOUGLAS JACKSON, No. 157835; Court of Appeals No. 342075. Motion to file an application for leave to appeal in excess of the page limitation denied at 501 Mich 1094.

Summary Disposition June 27, 2018:

PEOPLE v CHANDLER, No. 156620; Court of Appeals No. 333207. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing the admission of other-acts evidence and we remand this case to that court for reconsideration in light of *People v Denson*, 500 Mich 385 (2017), and *People v Golochowicz*, 413 Mich 298, 310-311 (1982). The prosecutor sought to admit the other-acts evidence to prove identity. "*Golochowicz* identifies the requirements of logical relevance when the proponent is utilizing a modus operandi theory to prove identity." *People v VanderVliet*, 444

Mich 52, 66 (1993). On remand, the Court of Appeals shall apply *Golochowicz* to determine whether the other-acts evidence was admissible to prove identity. The Court of Appeals shall consider whether the defendant's other act and the charged offense were sufficiently similar to support this theory of relevance. See *Denson*, 500 Mich at 402-404. In all other respects, leave to appeal is denied.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 27, 2018:

PEOPLE v BETTS, No. 148981; Court of Appeals No. 319642. The appellant shall file a supplemental brief within 42 days of the date of this order, addressing: (1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., amount to "punishment," see *People v Earl*, 495 Mich 33 (2014), see also *Does # 1-5 v Snyder*, 834 F3d 696, 703-706 (CA 6, 2016), cert den sub nom *Snyder v John Does # 1-5*, 138 S Ct 55 (Oct 2, 2017); and (2) whether the defendant's conviction pursuant to MCL 28.729 for failure to register under SORA is an ex post facto punishment, where the registry has been made public, and other requirements enacted, only after the defendant committed the listed offense that required him to register, US Const, art I, § 10; Const 1963, art 1, § 10. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Tucker* (Docket No. 152798) and *People v Snyder* (Docket No. 153696).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 27, 2018:

MICIURA v KURC, No. 156711; Court of Appeals No. 338945.

NORTLEY v HURST, No. 156790; reported below: 321 Mich App 566.

HARRISON v MUNSON HEALTHCARE, INC, Nos. 156830 and 156831; Court of Appeals Nos. 331957 and 332017.

WALBRO ENGINE MANAGEMENT, LLC v SURECAN, INC, No. 157087; Court of Appeals No. 333984.

Summary Disposition June 29, 2018:

DOA DOA, INC v PRIMEONE INSURANCE COMPANY, No. 156981; Court of Appeals No. 339215. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the November 22, 2017 order of the Court of Appeals reversing the Wayne Circuit Court's June 22, 2017 order, and we remand this case to the Court of Appeals for consideration as on leave granted.

MCNA INSURANCE COMPANY v DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET, No. 157456; Court of Appeals No. 342646. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Court of Appeals for plenary consideration. The Court of Appeals is directed to decide this case on an expedited basis. The motions for stay and to waive the requirements of MCR 7.209(A)(2) and (3) are denied.

MARKMAN, C.J. (*dissenting*). I respectfully dissent. While plaintiff acknowledges in its application that "competitive bidding statutes do not confer standing on bidders," and while this Court has long recognized that disappointed bidders do not possess an interest in the outcome of a bidding process for public contracts, *Talbot Paving Co v Detroit*, 109 Mich 657 (1896), plaintiff nonetheless contends that it possesses standing to maintain the instant action in the Ingham Circuit Court on the basis that it enjoys "statutory standing" under MCL 600.631. Although such an argument may be tenable under *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010) ("*LSEA*"), which held that "[a] litigant may have standing . . . if the statutory scheme implies that the Legislature intended to confer standing on the litigant," it is untenable under *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 616 (2004), overruled by *LSEA*, 487 Mich at 352, which held previously that the Legislature cannot expand "the realm of disputes cognizable by the judiciary . . . ." Given that plaintiff's argument directly implicates the critical difference between *LSEA* and cases such as *Cleveland Cliffs*, see also *Lujan v Defenders of Wildlife*, 504 US 555 (1992), I would grant leave to appeal to address whether *LSEA* should be overruled in order to restore the standing doctrine in Michigan to its proper constitutional roots, as well as to conform with federal constitutional law. *Lujan*, 504 US at 577 ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3.").

In my judgment, this Court's remand to the Court of Appeals for plenary consideration is unwarranted because, if plaintiff does not possess standing, the proper course of action for this Court would be to remand to the trial court for entry of an order dismissing the action. *Lee*

v Macomb Co Bd of Comm'rs, 464 Mich 726, 741 (2001), overruled by *LSEA*, 487 Mich at 352 ("Plaintiffs do not have standing to bring the present actions. We accordingly . . . remand these actions to the respective circuit courts for entry of orders dismissing plaintiffs' actions on the basis of lack of standing."). Indeed, as recently as last week, the United States Supreme Court observed, "In cases where a plaintiff fails to demonstrate Article III standing, [it] usually direct[s] the dismissal of the plaintiff's claims." *Gill v Whitford*, 585 US ___, ___ (2018) (Docket No. 16-1161), slip op at 21. I would address the issue of standing at this time without remanding to a lower court for further proceedings, particularly where upon remand that court will be bound by *LSEA*.

Put simply, there is no more critical matter than a proper conception of standing for a judicial body determined to operate within its constitutional purview and in the responsible exercise of the Constitution's "judicial power." US Const, art III, § 2; Const 1963, art 6, § 1. Accordingly, I would grant leave to appeal to address this issue.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 29, 2018:

PEOPLE v CORLEY, No. 155276; Court of Appeals No. 328532. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the trial court abused its discretion by declining to grant a new trial on grounds of newly discovered evidence, and in particular, whether the trial court erred in concluding that the newly discovered evidence would not make a different result probable on retrial. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied June 29, 2018:

NORTH AMERICAN BROKERS, LLC v HOWELL PUBLIC SCHOOLS, No. 155498; Court of Appeals No. 330126. On April 12, 2018, the Court heard oral argument on the application for leave to appeal the February 9, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied.

MCCORMACK, J. (*concurring*). The equitable principle of estoppel is many centuries old. Under the doctrine, a promise that the promisor should reasonably expect to produce action or inaction from its recipient may be binding if justice so requires. See Restatement Contracts, 2d, § 90. Its age highlights its staying power. Over the

years, it has been widely adopted, easily applied, and narrowly tailored. I agree with the Court that we should decline an invitation to disassemble it today.

The English Parliament adopted the first statute of frauds in 1677. Note, *Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 Mich L Rev 170, 170 (1967). The enactment of the statute was largely driven by concerns unique to the seventeenth century. As Sir William Holdsworth explains, at that time, tangible evidence of agreement was necessitated by the virtually unfettered discretion given to juries. 6 Holdsworth, A History of English Law (1924), p 388. Nothing prevented juries from receiving independent information on cases, and motions for a directed verdict were relatively new and untested at the time. *Id*. Additionally, the witness testimony that juries could hear was tightly restricted, as neither the parties to an action nor any parties interested in the outcome of the action were considered competent witnesses. *Id*. Within this framework, the statute of frauds played the important role of ensuring that juries were not provided false information regarding contracts that had never been formed.[1]

From the very beginning of British jurisprudence relating to the statute of frauds, British courts have applied equitable rules to enforce promises that induced a party to act in reliance. Costigan, Jr., *The Date and Authorship of the Statute of Frauds*, 26 Harv L Rev 329, 343 (1913). The British Court of Chancery would regularly apply these equitable rules, particularly equitable estoppel and specific performance, "if insistence on the letter of the statute would facilitate a fraud." 6 Holdsworth, p 393. From its inception, then, there was

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[1] As rules of evidence developed to address many of the concerns that gave rise to the statute of frauds, the statute came under criticism as unnecessary or dangerous. See Epstein, Starbird & Vincent, *Reliance on Oral Promises: Statute of Frauds and Promissory Estoppel*, 42 Tex Tech L Rev 913, 928 (2010) ("[The Statute of Frauds] remained the law in England until 1954 when most of its provisions were repealed so that it applies only to land contracts and guarantees. According to Professor John Krahmer of Texas Tech University School of Law, England abolished the statute of frauds 'for being superfluous and irrelevant.' While the statute of frauds has been virtually eliminated from the law of contracts in England, it remains an important (albeit long unpopular) part of the law of contracts in the United States."); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U Penn L Rev 440, 442 (1931) (" 'The special peculiarity of . . . the Statute of Frauds is that it is in the nature of things impossible that it ever should have any operation, except that of enabling a man to escape from the discussion of the question whether he has or has not been guilty of a deliberate fraud by breaking his word.' "), quoting Pollock & Stephens, *Section Seventeen of the Statute of Frauds*, 1 L Q Rev 1 (1885).

agreement that exceptions to the statute of frauds were needed in order to prevent the statute itself from perpetuating frauds. The trend crossed the pond. Today, promissory estoppel is employed in every variety of United States court. See 48 ALR 2d 1069.

Michigan is no outlier. Our Legislature passed the first statute of frauds in 1838, just after statehood, 1838 RS, pt 2, tit vi, ch 1, and before that, a statute of frauds could be found in Michigan's territorial laws, 1 Territorial Laws, Act of December 7, 1819, § 10, p 467. And this Court has applied the doctrine of equitable estoppel for nearly a century to prevent the statute from becoming "an instrument of fraud." *Lyle v Munson*, 213 Mich 250, 260 (1921); see also *Jones v Pashby*, 67 Mich 459, 462 (1887) ("[A] parol agreement under such circumstances would act as an estoppel, if acquiesced in for years, and the statute of frauds would not intervene to prevent the enforcement of such estoppel."). We have reaffirmed that principle time and time again. *Brummel v Brummel*, 363 Mich 447, 452 (1961) (citing cases). So too has the Legislature. Since 1921, the Legislature has amended the statute of frauds three times and never repudiated the statute's estoppel-based exceptions. 1945 PA 261; 1974 PA 343; 1992 PA 245.[2] When the Legislature reenacts a statute, we presume it did so with an understanding of the court's interpretation of it. See *Anzaldua v Band*, 457 Mich 530, 544 (1998), citing *Lorillard v Pons*, 434 US 575, 581 (1978). The doctrine has withstood the tests of time, and legislative and judicial scrutiny.

More recently, this Court affirmed promissory estoppel in *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354 (1982). There we declined to adopt "narrow and rigid rules for compliance with the statute of frauds." *Id*. at 367. Instead, we unanimously held that "recovery based on a noncontractual promise falls outside the scope of the statute of frauds" and that the plaintiff's claim of promissory estoppel required the denial of the defendant's summary disposition motion. *Id*. at 370. This conclusion was necessary to "avoid the arbitrary and unjust results required by an overly mechanistic application of the rule." *Id*. at 365.[3]

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[2] The 1992 revision added a section that the Court of Appeals has interpreted to prevent promissory estoppel from applying to suits against financial institutions. See *Crown Tech Park v D&N Bank, FSB*, 242 Mich App 538, 550 (2000).

[3] And the Chief Justice has recognized another equitable doctrine, partial performance, as creating an exception to the statute of frauds. *Vittiglio v Vittiglio*, 493 Mich 936, 936-937 (2013) (MARKMAN, J., concurring) ("[I]t is ultimately correct that plaintiff is bound by the settlement . . . [because] defendant gave plaintiff a check for $1.2 million in reliance on the settlement agreement, which was sufficient partial performance to take the oral settlement out of the statute of frauds and render it enforceable.").

We have considerable company. Three-fifths of the states apply promissory estoppel in some fashion despite the statute of frauds.[4] And only a handful of states have explicitly forbidden the use of promissory estoppel as an exception to the statute of frauds. The dissent's canvass of the several states makes the case that abandoning promissory estoppel remains a distinctly minority position.

And even the cases the dissent cites do not uniformly support its position. The dissent cites *Tiffany Inc v WMK Transit Mix, Inc*, 16 Ariz App 415, 421 (1972), for the proposition that promissory estoppel would nullify the statute of frauds. *Tiffany* is an intermediate court decision from Arizona, but the Arizona Supreme Court has held promissory estoppel may be applied to defeat the statute of frauds where "there is a second promise not to rely on the statute." *Mullins v Southern Pacific Transp Co*, 174 Ariz 540, 542 (1992). The cases the dissent cites from

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[4] *Kiernan v Creech*, 268 P3d 312, 316 (Alas, 2012); *Mullins v Southern Pacific Transp Co*, 174 Ariz 540, 542 (1992); *Ralston Purina Co v McCollum*, 271 Ark 840, 844 (1981); *Garcia v World Savings, FSB*, 183 Cal App 4th 1031, 1040 n 10 (2010); *Kiely v St Germain*, 670 P2d 764, 769 (Colo, 1983); *Taylor v Jones*, unpublished memorandum opinion of the Delaware Court of Chancery, issued December 17, 2002 (Case No. 1498-K); *Tauber v Dist of Columbia*, 511 A2d 23, 27 (DC App, 1986); *20/20 Vision Ctr, Inc v Hudgens*, 256 Ga 129, 135 (1986); *McIntosh v Murphy*, 52 Haw 29, 35 (1970); *Brown v Branch*, 758 NE2d 48, 52 (Ind, 2001); *Kolkman v Roth*, 656 NW2d 148, 153 (Iowa, 2003); *Bittel v Farm Credit Servs of Central Kansas*, 265 Kan 651, 659 (1998); *Snyder v Snyder*, 79 Md App 448 (1989); *Barrie-Chivian v Lepler*, 87 Mass App Ct 683, 685 (2015); *Del Hayes & Sons, Inc v Mitchell*, 304 Minn 275, 285 (1975); *Alpark Distrib, Inc v Poole*, 95 Nev 605, 608 (1979); *Eavenson v Lewis Means, Inc*, 105 NM 161 (1986), overruled on other grounds by *Strata Prod Co v Mercury Exploration Co*, 121 NM 622, 627-628 (1996); *In re Hennel Estate*, 29 NY3d 487, 494 (2017); *Home Elec Co of Lenoir, Inc v Hall & Underdown Heating & Air Conditioning Co*, 86 NC App 540, 543 (1987), aff'd 322 NC 107 (1988); *Knorr v Norberg*, 872 NW2d 323, 326 (ND, 2015); *Olympic Holding Co, LLC v ACE Ltd*, 122 Ohio St 3d 89, 96 (2009); *Lacy v Wozencraft*, 188 Okla 19 (1940); *Potter v Hatter Farms, Inc*, 56 Or App 254, 262 (1982); *Brochu v Santis*, 939 A2d 449, 453 (RI, 2008); *Durkee v Van Well*, 654 NW2d 807, 815 (SD, 2002), overruled in part on other grounds by *Mundhenke v Holm*, 787 NW2d 302, 306-307 (2010); *Shedd v Gaylord Entertainment Co*, 118 SW3d 695, 699-700 (Tenn App, 2003); *"Moore" Burger, Inc v Phillips Petroleum Co*, 492 SW2d 934, 937-938 (1972); *Stangl v Ernst Home Ctr, Inc*, 948 P2d 356, 365-366 (Utah App, 1997); *T— v T—*, 216 Va 867, 873 (1976); *Hoover v Moran*, 222 W Va 112, 119 (2008); *Klinke v Famous Recipe Fried Chicken, Inc*, 94 Wash 2d 255, 259-260 (1980); *McLellan v Charly*, 313 Wis 2d 623, 653 (2008); *B & W Glass, Inc v Weather Shield Mfg, Inc*, 829 P2d 809, 816-817 (Wy, 1992).

Maine and Washington are also unhelpful: *Stearns v Emery-Waterhouse Co*, 596 A2d 72 (Me, 1991) and *Greaves v Med Imaging Sys, Inc*, 124 Wash 2d 389 (1994). Although each case is evidence that promissory estoppel is not an immutable exception to the statute of frauds in those jurisdictions, neither has done away with the doctrine altogether (as the dissent would have us do here). *Harvey v Dow*, 962 A2d 322, 327 (Me, 2008) (applying promissory estoppel to an agreement to transfer land); *Klinke v Famous Recipe Fried Chicken, Inc*, 94 Wash 2d 255, 260 (1980) (applying promissory estoppel to restaurant franchise agreement). If there is any wisdom to be found in majorities, we should not rush to abandon promissory estoppel.

And then there's stare decisis.[5] We don't overrule precedent lightly. Our test for determining whether to overrule *Opdyke* has us consider these factors: (1) "whether the earlier decision was wrongly decided," (2) "whether the decision at issue defies practical workability," (3) "whether reliance interests would work an undue hardship," and (4) "whether changes in the law or facts no longer justify the questioned decision." *Robinson v Detroit*, 462 Mich 439, 464 (2000) (cleaned up).

As the brief tour of the statute's history, our relevant jurisprudence and that of our sister states demonstrates, *Opdyke* was correctly decided. Confronted with this same problem over the years and across jurisdictions, courts have repeatedly permitted parties to rely on promissory estoppel to enforce noncontractual promises in the right circumstances. This is unsurprising, as the doctrine exemplifies practical workability by setting out a straightforward legal rule for courts to follow. The Court of Appeals opinion in this case proves the point: for all its grousing about the result, the panel had no trouble reaching it.[6]

To overrule *Opdyke* and reject equitable exceptions to the statute of frauds would contravene core principles of stare decisis. Stability in the law is usually preferred, as it prevents arbitrary discretion by courts. *McCormick v Carrier*, 487 Mich 180, 210 (2010). Considerations in favor of stability are strongest in "cases involving property and contract rights, where reliance interests are involved . . . ." *Payne v Tennessee*, 501 US 808, 828 (1991). And overruling a 35-year-old unanimous opinion would be especially noteworthy. See Garner et al, *The Law of*

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[5] "Stare decisis," the Latin phrase that means "to stand by the decided matters," is, of course, our shorthand for the principle that guides our branch of government: that we should respect our earlier decisions.

[6] Writing in support of the defendants, Michigan Realtors argues that *Opdyke* undermines good business practices, and the dissent is persuaded that this should feature in our consideration. We are in no position to gainsay these policy arguments, but they are more properly directed towards the Capitol Building, not the Hall of Justice. The Legislature has amended the statute of frauds to clarify the application of promissory estoppel for certain industries. See *Crown Technology Park v D&N Bank*, 242 Mich App 538, 549 (2000) (interpreting MCL 566.132(2)). It can do so for this industry if it chooses to.

Judicial Precedent (St Paul: Thomson/West, 2016), p 182 ("When everyone sitting on a case agrees on the outcome of an issue or case, the panel speaks with one voice. The decision carries the full weight of the panel's authority. . . . Other things being equal, courts will usually consider a precedent that speaks for a unanimous court as more authoritative than one that speaks for a split panel.").

But there's more. To abandon all equitable exceptions to the statute of frauds, as the dissent advocates, implicates not only *Opdyke*, but also more than a century of our Court's precedent (not to mention centuries of English common law before that). While the dissent believes that this result is warranted by the plain language of the text and by principles of judicial restraint, in fact overruling, in one fell swoop, centuries of well-settled precedent tilts in the other direction. "[T]he longer a rule has continued, the more thoroughly has it inevitably become interwoven with the business and property interests of the community at large; and, therefore, the more disastrous must be a change, especially a sudden change." Wells, A Treatise on the Doctrines of Res Judicata and Stare Decisis (1878), pp 544-545. The dissent has this characterization backwards; the majority's decision today is compelled by principles of stability and judicial modesty.[7]

The rule has not, moreover, declared open season on contracts. As an equitable doctrine, courts retain the discretion to strictly enforce the statute of frauds. Countless decisions have done just that. E.g., *Hazime*

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[7] If it is a retreat from textualism, as the dissent asserts, to recognize that in certain instances—this case being an obvious example—the doctrine of stare decisis operates as a pragmatic exception to dogmatic textualism, at least I have the comfort of knowing that I am in good company. See Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), pp 138-139 ("Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew. It is of no more consequence at this point whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment than it is whether *Marbury v. Madison* was decided correctly."); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 413-414 (asserting that "[s]tare decisis . . . is not a part of textualism. It is an exception to textualism . . . born not of logic but of necessity. Courts cannot consider anew every previously decided question that comes before them. Stare decisis has been a part of our law from time immemorial, and we must bow to it. All we categorically propose here is that, when a governing precedent deserving of stare decisis effect does not dictate a contrary disposition, judges ought to use proper methods of textual interpretation. If they will do that, then over time the law will be more certain, and the rule of law more secure.").

v Martin Oil Co of Ind, 792 F Supp 1067 (ED Mich, 1992); *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441-443 (1993); *Lovely v Dierkes*, 132 Mich App 485, 489-490 (1984). We have also limited the doctrine—such as requiring the promise to be "clear and definite"—to ensure it is not abused. *State Bank of Standish v Curry*, 442 Mich 76, 85 (1993). Contrary to the claims of the dissent, the reliance interests cut squarely in favor of maintaining our precedents. Citizens, businesses, and lawyers naturally will rely on any doctrine that has endured a century or more, particularly after it was clarified by *Opdyke*.[8] And that is especially true where the Legislature has never amended the statute of frauds to eliminate the exception.

While it may be correct that very few people have ever entered an agreement with the expectation of having it violated and later judicially enforced by promissory estoppel, this view misses the point. Very few people have ever driven a car with the expectation of triggering their airbags, but the presence of the safety device allows them peace of mind and mitigates injuries from the unexpected crash. Just so, promissory estoppel allows parties to trust each other in matters where trust is essential and permits limited recovery where a party has acted in bad faith. See *Curry*, 442 Mich at 83-84. And, finally, the dissent makes no claim that any changes in the law justify overturning *Opdyke*. But this is not surprising because there have been no relevant changes to the law since *Opdyke* was decided, which underscores the ongoing vitality of the decision.

There are times when courts must overturn precedent. But, in my view, those occasions should be rare and the case for doing so compelling. This is plainly not one of those cases.

Even if doctrine had grown stale, this case would be a poor vehicle to upend it. I largely agree with the dissent's view of the facts, but one key point is missing: the defendant chose not to produce any evidence to support its position regarding summary disposition. Instead of giving the trial court facts from which it could have determined that the plaintiff's claim of promissory estoppel was not supported, it decided instead to ask the court to hold the doctrine inapplicable, an impossible request of any court but this one.

This strategic decision should have prevented the trial court from granting the defendant's motion for summary disposition under MCR 2.116(C)(8). In ruling on the motion, the trial court must accept all well-pled factual allegations as true in the light most favorable to the nonmoving party, and it may only grant the motion if the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). At this stage, the court may only consider the pleadings. *Id*. at 119-120. The "existence and scope of the promise are questions of

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[8] Promissory estoppel has also gained widespread acceptance in learned treatises. E.g., Restatement Contracts, 2d, § 90; 4 Williston, Contracts (4th ed), § 8:4; 4 Am Jur 2d, Proof of Facts, § 641; 3 Williston & Jaeger, A Treatise on the Law of Contracts (3d ed), § 533A.

fact . . . ." *Curry*, 442 Mich at 84. The question for the trial court was, "Was there sufficient evidence, which, if believed by the trier of fact, would support a finding of estoppel sufficient to circumvent the statute of frauds?" *Conel Dev, Inc v River Rouge Savings Bank*, 84 Mich App 415, 423 (1978).

The plaintiffs claim that the defendant promised them they would be paid a broker's commission for their role in matching the defendant with a buyer. They submitted a photo of the defendant's sign that read "Brokers Protected" and alleged that this text is understood in their industry as a promise to pay a brokerage fee. The defendant made no counter allegations and submitted nothing to rebut the plaintiffs' claims. Perhaps if the defendant had submitted evidence in support of summary disposition, the trial could have properly concluded that there was no "clear and definite" promise, and thus, promissory estoppel was inapposite. But because it did not, the trial court was obligated to follow *Opdyke* and was not in a position to make the new rule of law the dissent would want this Court to make. And the Court of Appeals was correct to reverse the trial court's grant of the defendant's motion on this record.

What's more, the procedural history of this case makes it a poor candidate to announce a watershed ruling. It is interlocutory, and discovery has not taken place, so there is still room for factual development. If we were to make the robust doctrinal move the dissent would have us make, this would be a startling case in which to do so.

For all these reasons, the Court is correct to deny leave on this case.

VIVIANO, J., joined the statement of MCCORMACK, J.

ZAHRA, J. (*dissenting*). The issue in this case is straightforward. MCL 566.132(1)(e) plainly provides that an agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate promise is void unless that agreement, contract, or promise is in writing and signed by the party to be charged with the agreement, contract, or promise. Despite this legislative directive, this Court has sanctioned the enforcement of an unwritten promise to pay a commission for or upon the sale of an interest in real estate. Because the law clearly provides that this promise is void, it is not enforceable. Accordingly, I dissent. I would overrule this Court's decision in *Opdyke Investment Co v Norris Grain Co*[1] and apply the plain language of MCL 566.132(1)(e).

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs are real estate brokers who seek compensation for their efforts in procuring the sale of real property from defendant Howell Public Schools to defendant St. John Hospital. According to plaintiffs' complaint, Howell Public Schools offered for sale real property through a sign stating that the sale was "broker protected." The complaint alleges that this sign "explicitly promised [p]laintiffs that [Howell Public Schools] would honor the earned broker fee for delivering to [Howell Public Schools] a buyer." Plaintiffs allege that they relied on this

[1] *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354 (1982).

promise by expending considerable effort to broker a sale of the property to St. John. According to the complaint, plaintiffs contacted an associate superintendent of Howell Public Schools and informed him they had a "client" interested in viewing their listed properties. Later, plaintiffs met with this associate superintendent at one of Howell Public Schools' properties, the Latson School Property, and toured the site. Afterwards, plaintiffs sent St. John a "Letter of Intent" to sign and return. St. John did not return the document. Plaintiffs also sent the associate superintendent a "Confidentiality, Commission & Broker Protection Agreement." This document was likewise not returned, apparently and according to plaintiffs' complaint, because plaintiffs sought an 8% commission for the sale. Plaintiffs allege in their complaint that "[u]pon information and belief, sometime in, or around, early April 2014, one of the Defendants caused Thomas A. Duke Company, a commercial real estate company, to fashion a purchase agreement for the sale of the Latson School Property from Howell [Public] Schools to St. John." Plaintiffs' complaint further alleges that defendants learned in late April 2014 of plaintiffs' efforts to broker a sale between them. Plaintiffs allege that "a few months later, on July 7, 2014, Howell [Public] Schools entered into a purchase agreement with St. John for the Latson School Property."

In lieu of an answer, defendants filed a motion for summary disposition, arguing that plaintiffs' complaint must be dismissed under MCL 566.132, commonly known as the statute of frauds. The statute of frauds requires certain types of agreements to be in writing and signed by the party against whom it will be enforced. This expressly includes "[a]n agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate." MCL 566.132(1)(e). Plaintiffs countered that the statute of frauds did not apply because plaintiffs pleaded a theory of promissory estoppel, which is a judicially created exception to the statute of frauds. The circuit court granted defendants' motion and dismissed the case.[2]

The Court of Appeals reversed, reluctantly holding that "[r]egardless of the wisdom of using a judicially created exception to a statute, we must apply it."[3] Relying entirely on this Court's decision in *Opdyke*, the panel stated that "[t]he Michigan Supreme Court created and has upheld the [promissory estoppel] exception" and acknowledged that it "is bound to follow decisions of our Supreme Court."[4] The panel urged this Court to grant leave to address the issue presented in this case,

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[2] Plaintiffs and St. John reached a settlement, and St. John was dismissed from the case.

[3] *North American Brokers v Howell Pub Sch*, unpublished per curiam opinion of the Court of Appeals, issued February 9, 2017 (Docket No. 330126), p 3. Indeed, the panel "acknowledge[d] that [its] opinion reaches the *correct* result under our present legal framework," yet stated, "it is the *wrong* result." *Id*. at 3 n 2.

[4] *North American Brokers*, unpub op at 3 (quotation marks and citation omitted).

opining that "[t]he judicially created doctrine of promissory estoppel, as applied to the facts of this case, subsumes the statute of frauds and makes the statute of frauds irrelevant."[5]

Howell Public Schools appealed in this Court. We ordered argument on the application and requested that the parties file supplemental briefs on the question whether promissory estoppel is an exception to the statute of frauds.

II. ANALYSIS

MCL 566.132(1) expressly provides in relevant part:

> In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> * * *
>
> (e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.

There is no dispute that the plain language of MCL 566.132 renders "void" Howell Public Schools' alleged "promise . . . to pay a commission for or upon the sale of an interest in land" because there is no "writing" that is "signed with an authorized signature by" Howell Public Schools. In fact, plaintiffs admit that Howell Public Schools flat-out refused to sign their proposed agreement. The text of MCL 566.132 is clear and definite; unless there is a writing signed with an authorized signature by the party to be charged, the promise is void. The Legislature did not provide for any exceptions to this rule. Thus, the statute of frauds should apply in this case.

Like the Court of Appeals panel in this case, I have previously been in a position to "reluctantly agree" that the statute of frauds can be circumvented through judicially created exceptions "[r]ather than deferring to the Legislature to address through the legislative amendment process any perceived inequity in the statute of frauds . . . ."[6] In doing so, "Michigan courts have by judicial fiat created gaping holes in the statute of frauds that are inconsistent with the express language of the statute and the policy supporting it[.]"[7] Now, as a justice of the Michigan Supreme Court, I continue to repudiate any judicially created

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[5] *Id*. at 3 n 2.

[6] *Kelly-Stehney & Assoc, Inc v MacDonald's Indus Prod, Inc*, 254 Mich App 608, 613-615 (2003), vacated on other grounds 469 Mich 1046 (2004).

[7] *Id*. at 615.

doctrine that has "developed to avoid the arbitrary and unjust results required by an overly mechanistic application of the [statute of frauds]."[8] It bears repeating that

> [a]llowing judge-made doctrines such as estoppel to override and preclude the application of legislatively created laws such as the statute of frauds "is contrary to well-founded principles of statutory construction and is inconsistent with traditional notions of the separation of powers between the judicial and legislative branches of government."[9]

The concurrence states that we ought not reverse *Opdyke* under principles of stare decisis. Indeed, this Court is generally reluctant to overturn precedent. It is often argued that the Court should be particularly careful overturning statutory precedent that the Legislature is in a position to clarify on its own through new legislation. Nonetheless, this Court has recognized that "legislative acquiescence . . . is an exceptionally poor indicator of legislative intent."[10] Further, this Court has also made clear that egregious departures from the plain language of the text ought to be addressed sooner than later, explaining:

> [I]t is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect . . . that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no

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[8] *Opdyke*, 413 Mich at 365.

[9] *Kelly-Stehney*, 254 Mich App at 615-616, quoting *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 548 n 4 (2000), citing Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), pp 14-29.

[10] *McCahan v Brennan,* 492 Mich 730, 749 (2012).

> constitutional warrant, it can gain no higher pedigree as later courts repeat the error. [*Robinson v Detroit*, 462 Mich 439, 467-468 (2000).]

In such cases, where the result of a decision effectively "usurp[s]" or "nullif[ies]" the "legislative function," this Court is obligated to correct that decision, regardless whether the Legislature has " 'acquiesced' in the decisions of the Court to which it has not responded . . . ."[11] In my view, *Opdyke*, which was apparently "developed to avoid the arbitrary and unjust results required by an overly mechanistic application of the [statute of frauds]],"[12] is an ideal candidate for reversal. This Court in *Opdyke* not only usurped the Legislature's power but simultaneously amended the statute of frauds by judicial fiat to frustrate the express intentions of the Legislature,[13] i.e., to render void certain agreements, contracts, or promises unless in writing and signed.

In determining whether to overrule a prior case, this Court first considers whether the earlier case was wrongly decided.[14] *Opdyke* disregarded the language of MCL 566.132 and deviated from this Court's pattern of cases interpreting it.[15] The Court stated that "[s]ince the statute of frauds only applies to certain 'contracts', recovery based on a noncontractual promise falls outside the scope of the statute of frauds."[16] Yet MCL 566.132(1)(e) expressly applies not just to contracts but also, explicitly, to "promise[s]."[17] And assuming the goal of the statute of frauds is to protect against fraud and perjury for transactions that the Legislature deemed so significant as to require that the transaction be memorialized in writing, the doctrine of promissory estoppel adds nothing to advance this purpose. As demonstrated in this case, Howell Public Schools has done nothing legally, or even morally, wrong, yet it is now subject to potential liability because plaintiffs have claimed that they relied on a promise. And Howell Public Schools was not even aware of plaintiffs' reliance. Further, even though Howell Public Schools expressly refused to execute a contract with plaintiffs, this Court has essentially imposed the obligation of that contract upon Howell Public Schools.

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[11] Collier & DeRosier, *Understanding the Overrulings: A Response to Robert Sedler*, 56 Wayne L Rev 1761, 1777-1778 (2010).

[12] *Opdyke*, 413 Mich at 365.

[13] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 213 (2007).

[14] *Robinson*, 462 Mich 439, 463-468.

[15] MCL 566.132 has been amended and renumbered since *Opdyke* was decided, but the changes have no bearing on this analysis. See 1974 PA 343 and 1992 PA 245.

[16] *Opdyke*, 413 Mich at 370.

[17] The version of the provision in effect when *Opdyke* was decided, MCL 566.132(e), also applied to a "promise." See 1974 PA 343.

As cogently explained by amicus curiae Michigan Realtors (amicus), *Opdyke* undermines the good business practices of more than 28,000 appraisers, brokers, and salespersons licensed under Michigan law, who are "consistently taught that there is no entitlement to a commission based upon agreements or promises that are not in writing and are not signed by the party to be charged." The members of amicus are clearly significant stakeholders to this aspect of Michigan law, as they are involved in hundreds of real estate transactions each day. This Court should not dismiss amicus's concern that "[t]he application of promissory estoppel to circumvent the statute of frauds creates an exception to an otherwise clear rule and fosters uncertainty and ambiguity in what are currently fairly 'cut and dried' transactions." In particular, amicus highlights that "[t]he application of promissory estoppel to the . . . statute of frauds potentially subjects sellers of residential real estate in Michigan to claims for more than one commission." Members of amicus are not seeking special treatment, but are only requesting that Michigan courts faithfully apply the plain language of the statute of frauds in all cases. Sustaining this Court's decision in *Opdyke* will only continue to undermine the "practical workability" of amicus's good business practices and result in unnecessary and costly litigation.[18] Thus, I am convinced that *Opdyke* was wrongly decided.

The notion that promissory estoppel is barred by a legislative directive that particular contracts must be in writing is not radical. Indeed, several out-of-state jurisdictions have enforced the statute of frauds and rejected judicially created exceptions to it for the same reason. *Stearns v Emery-Waterhouse Co*[19] (stating that the application of promissory estoppel "contravenes the policy of the Statute to prevent fraud"); *Greaves v Med Imaging Sys, Inc*[20] ("We have consistently declined to adopt [the application of promissory estoppel to avoid the statute of frauds], although we have considered it in several prior

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[18] I strongly disagree with the concurrence that amicus has presented policy arguments that "are more properly directed towards the Capitol Building, not the Hall of Justice." The only policy that Howell Public Schools and amicus seek to apply is that which the Legislature has already written in the statute of frauds. The problem is not that the Legislature has failed to act; it is that this Court refuses to apply the law by giving plain and ordinary meaning to the legislative mandate that "[a]n agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate" "must be in writing." MCL 566.132(1)(e). And to suggest that these arguments are better directed towards the same body that wrote this clear and unambiguous directive is truly puzzling, given this Court's refusal to apply the statute of frauds as currently written.

[19] *Stearns v Emery-Waterhouse Co*, 596 A2d 72, 74-75 (Me, 1991).

[20] *Greaves v Med Imaging Sys, Inc*, 124 Wash 2d 389 (1994).

cases."); *Morsinkhoff v DeLuxe Laundry & Dry Cleaning Co*[21] ("To allow recovery on the theory of promissory estoppel would abrogate the purpose and intent of the legislature in enacting the Statute of Frauds and would nullify its fundamental requirements."); *Tiffany Inc v WMK Transit Mix, Inc*[22] (Allowing a claim for promissory estoppel would mean "the Statute of Frauds would no longer have any effect."); *Sinclair v Sullivan Chevrolet Co*[23] ("Where, however, a case is clearly within the Statute of Frauds, promissory estoppel is inapplicable, for the net effect would be to repeal the Statute completely."); *Austin v Cash*[24] (" '[W]here a case is clearly within the statute of frauds, promissory estoppel is inapplicable, for the net effect would be to repeal the statute completely. . . . [T]he moral wrong of refusing to be bound by an agreement because it does not comply with the statute of frauds, does not of itself authorize the application of the doctrine of estoppel, because the breach of a promise which the law does not regard as binding is not a fraud.' "); *Anderson Constr Co, Inc v Lyon Metal Prod, Inc*[25] ("[T]his Court, contrary to the course pursued by some others, has uniformly held that it is without power to engraft exceptions on the statute, and must enforce it as written. . . . To hold otherwise would destroy the purpose of the statute to prevent frauds and perjuries."); *Bethune v City of Mountain Brook*[26] ("[I]t is well settled in Alabama that an executory agreement which is void under the statute of frauds cannot be made effectual by estoppel merely because it has been acted on by the promisee, and has not been performed by the promisor."); see also *Lovely v Dierkes*[27] ("It would seem inconsistent to claim detrimental reliance on an oral contract while acknowledging the importance of a written contract.").

Likewise, our caselaw supports the conclusion that the statute of frauds cannot be circumvented by a promissory estoppel claim. See, e.g., *Collin v Kittelberger*[28] (applying prospectively from effective date of the statute of frauds, any contract for commissions on order of realty must be in writing, but did not affect a contract existing when it took effect); *Paul v Graham*[29] (holding that "[i]n order to give the act the effect which

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[21] *Morsinkhoff v DeLuxe Laundry & Dry Cleaning Co*, 344 SW2d 639, 644 (Mo App, 1961).

[22] *Tiffany Inc v WMK Transit Mix, Inc*, 16 Ariz App 415, 421 (1972).

[23] *Sinclair v Sullivan Chevrolet Co*, 45 Ill App 2d 10, 17 (1964).

[24] *Austin v Cash*, 274 Mont 54, 62 (1995), quoting *Schwedes v Romain*, 179 Mont 466, 472 (1978).

[25] *Anderson Constr Co, Inc v Lyon Metal Prod, Inc*, 370 So 2d 935, 937 (Miss, 1979) (quotation marks and citation omitted).

[26] *Bethune v City of Mountain Brook*, 293 Ala 89, 93 (1974).

[27] *Lovely v Dierkes*, 132 Mich App 485, 492 n 1 (1984) (PETERSON, J., dissenting).

[28] *Collin v Kittelberger*, 193 Mich 133 (1916).

[29] *Paul v Graham*, 193 Mich 447, 451 (1916).

the Legislature evidently intended it should have, . . . no recovery can be had under this section [of the statute of frauds] unless the agreement therefor is in writing"); *McGavock v Ducharme*[30] (holding that the statute of frauds rendered absolutely void an oral promise to pay 3% commission on the sale of a property); *Slocum v Smith*[31] (holding that the provision of the statute of frauds related to promises to pay commissions extended to agreements to purchase as well as agreements to sell, and determining that plaintiff was not entitled to recovery under a quantum meruit claim based on an oral promise in violation of the statute of frauds); *Smith v Starke*[32] (holding that oral agreement to find a purchaser for a farm in exchange for commission was void under the statute of frauds, and plaintiff was not permitted recovery under quantum meruit); *Aetna Mtg Co v Dembs*[33] (holding that the statute of frauds required that an agreement for commission for obtaining mortgage on land be reduced to a signed writing and an oral agreement for commission was not valid). Historically, this Court has consistently construed this particular provision of the statute of frauds to prevent oral promises and claims for equitable remedies from circumventing the statute's writing requirement. Accordingly, the natural conclusion is that *Opdyke* is an aberration.[34]

To determine whether a case that was wrongly decided should be overruled, the Court must "examine reliance interests," specifically:

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[30] *McGavock v Ducharme*, 192 Mich 98 (1916).

[31] *Slocum v Smith*, 195 Mich 281 (1917).

[32] *Smith v Starke*, 196 Mich 311 (1917).

[33] *Aetna Mtg Co v Dembs*, 13 Mich App 686 (1968).

[34] It is passing strange that the concurrence would quote Justice Antonin Scalia to place the question whether *Opdyke* should be overruled on equal footing with the questions "whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment . . . [and] whether *Marbury v. Madison* was decided correctly." As Justice Scalia noted in his more recent book with Bryan Garner, *Reading Law: The Interpretation of Legal Texts*:

> We do not propose that all the decisions made, and doctrines adopted, in the past half-century or so of unrestrained constitutional improvisation be set aside—only those that fail to meet the criteria for stare decisis. These include consideration of (1) whether harm will be caused to those who justifiably relied on the decision, (2) how clear it is that the decision was textually and historically wrong, (3) whether the decision has been generally accepted by society, and (4) whether the decision permanently places courts in the position of making policy calls appropriate for elected officials. [Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 412 (citations omitted).]

> whether the prior decision defies "practical workability"; whether the prior decision has become so embedded, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations; whether changes in the law or facts no longer justify the prior decision; and whether the prior decision misread or misconstrued a statute.[35]

Suffice to say that very few people have ever sought to enter an agreement, contract, or promise expecting to enforce the agreement, contract, or promise based on an equitable exception to the statute of frauds. And for those who have done so, they would necessarily be precluded from asserting an equitable claim because they would in effect have "unclean hands." Thus, overruling *Opdyke* would not unsettle a single person's legitimate expectations.[36]

Opdyke is not only inconsistent with Michigan caselaw that suggests the statute of frauds cannot be circumvented by a promissory estoppel, see notes 28 through 32 of this statement, it has on at least three occasions been criticized in the Court of Appeals. See, e.g., *Lovely*, 132 Mich App at 491-496 (PETERSON, J., dissenting); *Kelly-Stehney & Assoc, Inc*, 254 Mich App at 613-615; and *North American Brokers*, unpub op at 3, the opinion of the Court of Appeals in the instant case. Thus *Opdyke* hardly qualifies, in the vein of *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), as "generally accepted by society." Moreover, *Opdyke* is textually wrong, and permanently leaves this Court and lower courts in the position of determining on a case-by-case basis which of the many competing policy interests presented deserves exception from application of the plain language of the statute of frauds.

The concurrence caricatures the dissenting position as "dogmatic textualism." To the contrary, the dissent merely recognizes that it is the text of the law to which the people first look to understand their rights and responsibilities. And the "doctrine [of stare decisis] is not, to be sure, an imprisonment of reason." *United States v Int'l Boxing Club of NY*, 348 US 236, 249 (1955) (Frankfurter, J., dissenting).

[35] *Rowland*, 477 Mich at 215, citing *Robinson*, 462 Mich at 464-467.

[36] The fact that a party may eventually rely on promissory estoppel or another equitable exception after they make an oral agreement and once litigation has ensued is irrelevant to the stare decisis analysis. In analyzing reliance interests and whether the prior decision has become so embedded or fundamental to everyone's expectations that to change it would produce significant dislocations, this Court does not look to after-the-fact awareness of the previous caselaw. See *Robinson*, 462 Mich at 466-467 ("Such after-the-fact awareness does not rise to the level of a reliance interest because to have reliance the knowledge must

The concurrence also suggests that *Opdyke*, a case decided by this Court in 1982, ought not be reversed because it is grounded in common-law principles of equities that are centuries old. While I agree that "[t]he equitable principle of estoppel is many centuries old," the principle of promissory estoppel was not developed until sometime in the twentieth century, was not embraced by the Michigan Supreme Court until 1977,[37] and was not accepted as an exception to the statute of frauds until *Opdyke* in 1982. *Black's Law Dictionary* (10th ed) reflects that the earliest known use of the phrase "promissory estoppel" in English was in 1924, and scholars recognize that there was "initial judicial reluctance to apply the doctrine after its formulation in section 90 of the first *Restatement of Contracts* . . . in 1932."[38] Unlike estoppel in general, the doctrine of promissory estoppel stands out, as once suggested, in "that promissory estoppel had become 'perhaps the most radical and expansive development of this century in the law of promissory liability.' "[39] Born of the legal realism movement, which espoused "[t]he theory that law is based not on formal rules or principles but instead on judicial decisions deriving from social interests and public policy as conceived by individual judges,"[40] the doctrine of promissory estoppel is plainly in tension with the more recent emphasis from this Court on the doctrine of textualism, in which "the words of a governing text are of paramount concern and . . . what they fairly convey in their context is what the text means."[41] "Courts that have taken a textualist approach with respect to implied terms generally have not identified implied estoppel exceptions."[42] Rather, a textualist approach recognizes that where the Legislature has intended for exceptions to apply to the statute of frauds, it has expressly provided those exceptions.

Accordingly, a textualist approach would embrace the notion that when the Legislature intended for common law and other exceptions to apply to the statute of frauds for the Uniform Commercial Code, it expressly provided those exceptions. See MCL 440.2201(3)(a) through (c). This is reflected in Justice MARKMAN's concurrence in *Vittiglio v Vittiglio*.[43] Although Justice MCCORMACK posits that in *Vittiglio* "the Chief Justice has recognized another equitable doctrine, partial performance, as creating an exception to the statute of frauds," there is a textual basis for applying part performance to remove an agreement

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be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event.").

[37] *Huhtala v Travelers Ins Co*, 401 Mich 118, 126-130 (1977).

[38] Feinman, *Promissory Estoppel and Judicial Method*, 97 Harv L Rev 678, 678 (1984).

[39] Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 Hastings L J 1191, 1192 (1998) (citation omitted).

[40] *Black's Law Dictionary* (10th ed).

[41] *Id*.

[42] Maggs, *Estoppel and Textualism*, 54 Am J Comp L 167, 178 (2006).

[43] *Vittiglio v Vittiglio*, 493 Mich 936 (2013) (MARKMAN, J., concurring).

from within the statute of frauds. MCL 566.106 and MCL 566.108 were the statute of frauds provisions at issue in *Vittiglio*, and those provisions are distinct from the statute of frauds provision at issue in the instant case, i.e., MCL 566.132(1)(e). MCL 566.106 provides as follows:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

And MCL 566.108 provides as follows:

> Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing: Provided, That whenever any lands or interest in lands shall be sold at public auction and the auctioneer or the clerk of the auction at the time of the sale enters in a sale book a memorandum specifying the description and price of the land sold and the name of the purchaser, such memorandum, together with the auction bills, catalog or written or printed notice of sale containing the name of the person on whose account the sale is made and the terms of sale, shall be deemed a memorandum of the contract of sale within the meaning of this section.

Although MCL 566.106 and MCL 566.108 are distinct statute of frauds provisions from MCL 566.132, all three provisions are contained within Chapter 566 of the Michigan Compiled Laws. And MCL 566.110 provides as follows: "Nothing in this chapter [i.e., Chapter 566] contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements, in cases of *part performance* of such agreements." (Emphasis added.) That is, the Legislature has explicitly adopted a provision to make clear that "part performance" may operate as an exception to the statute of frauds.

That the Legislature felt the need to affirmatively specify that "part performance" may constitute an exception to the statute of frauds reinforces the proposition that, as actually written, the statute of frauds does not already contain equitable exceptions of the sort read into it by the majority in acquiescing to *Opdyke*. Clearly, where the Legislature believes it proper to establish an exception to the statute of frauds, it has provided for such exception. When the history of this Court's retreat from textually grounded interpretations of the law is written, its erosion of the statute of frauds in such cases as this will be writ large.

III. CONCLUSION

I would overrule this Court's decision in *Opdyke* and apply the plain language of MCL 566.132(1). Accordingly, I would reverse the opinion and order of the Court of Appeals and remand to the circuit court to reinstate the judgment in favor of Howell Public Schools.

MARKMAN, C.J., and WILDER, J., joined the statement of ZAHRA, J.

Reconsideration Denied June 29, 2018:

PEOPLE v BRYANT, No. 154565; Court of Appeals No. 325569. Summary disposition order entered at 501 Mich 1070.

Summary Disposition July 3, 2018:

EPPS v 4 QUARTERS RESTORATION, LLC, No. 156480; Court of Appeals No. 337761. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v CALDWELL, No. 156701; Court of Appeals No. 337632. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for a determination of whether the defendant is indigent and, if so, for the appointment of substitute appellate counsel, in light of *Halbert v Michigan*, 545 US 605 (2005). Based on our review of the record, the circuit court granted original appointed appellate counsel's motion to withdraw, but did not address the request for the appointment of substitute appellate counsel. On remand, substitute appellate counsel, once appointed, may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and/or any appropriate postconviction motions in the circuit court, within six months of the date of the circuit court's order appointing counsel. Counsel may include among the issues raised, but is not required to include, the issues that were raised by the defendant in his motion for relief from judgment that was filed in 2016. The defendant's motion for appointment of counsel and his motions for miscellaneous relief are denied as moot. We do not retain jurisdiction.

PEOPLE v THURMAN, No. 156768; Court of Appeals No. 340296. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of whether the defendant's delayed application for leave to appeal was timely filed by virtue of the prison mailbox rule, MCR 7.205(A)(3). We do not retain jurisdiction.

PEOPLE v PETTO, No. 157075; Court of Appeals No. 339997. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied July 3, 2018:

PEOPLE v SEAN RUTLEDGE, No. 155294; Court of Appeals No. 323314.

PEOPLE v TENNILLE, No. 155352; Court of Appeals No. 323059.

PEOPLE v CARSWELL, No. 155420; Court of Appeals No. 329476.

PEOPLE v DUNCAN, No. 155548; Court of Appeals No. 335379.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v YOUNG, No. 155977; Court of Appeals No. 338098.

PEOPLE v DAVIS, No. 156170; Court of Appeals No. 337201.

PEOPLE v KIM MILES, No. 156369; Court of Appeals No. 337252.

PEOPLE v WATSON, No. 156372; Court of Appeals No. 337250.

PEOPLE v WITHERS, No. 156414; Court of Appeals No. 337989.

PEOPLE v SHURLOW, No. 156473; Court of Appeals No. 338661.

PEOPLE v NORFLEET, No. 156533; reported below: 321 Mich App 68.

PEOPLE v HENLEY, No. 156574; Court of Appeals No. 339217.

PEOPLE v COLVIN, No. 156627; Court of Appeals No. 339220.

PEOPLE v GIBSON, No. 156654; Court of Appeals No. 338405.

PEOPLE v ROBERT DENNIS, No. 156662; Court of Appeals No. 339290.

PEOPLE v DAWSON, No. 156663; Court of Appeals No. 339748.

PEOPLE v FOMBY, No. 156666; Court of Appeals No. 332090.

PEOPLE v STEPHENS, No. 156697; Court of Appeals No. 338516.

PEOPLE v ZIMMERMAN, No. 156709; Court of Appeals No. 338554.

PEOPLE v MARSILI, No. 156712; Court of Appeals No. 340230.

PEOPLE v KENNETH WILSON, No. 156713; Court of Appeals No. 338626.

PEOPLE v PALOMBO, No. 156715; Court of Appeals No. 337769.

PEOPLE v MANN, No. 156731; Court of Appeals No. 337804.

PEOPLE v CLEVELAND, No. 156739; Court of Appeals No. 327120.

PEOPLE v DILTS, No. 156767; Court of Appeals No. 338095.

ALLSTATE INSURANCE COMPANY v AUTO CLUB INSURANCE ASSOCIATION and ALLSTATE INSURANCE COMPANY v HARRIS, No. 156773; Court of Appeals No. 338895.

MAUER v GIDLEY and MAUER v DEPARTMENT OF CORRECTIONS, Nos. 156780 and 156781; Court of Appeals Nos. 333230 and 333874.

PEOPLE v PRESCOTT, No. 156784; Court of Appeals No. 339359.

PEOPLE v LOUIS, No. 156785; Court of Appeals No. 339851.

PEOPLE v ERNEST ALLEN, No. 156799; Court of Appeals No. 339555.

PEOPLE v VARNES, No. 156812; Court of Appeals No. 340222.

PEOPLE v MANN, No. 156836; Court of Appeals No. 337805.

PEOPLE v EVANS, No. 156839; Court of Appeals No. 338528.

PEOPLE v ROBERTSON, No. 156844; Court of Appeals No. 338574.

PEOPLE v RODERICK HARRIS, No. 156847; Court of Appeals No. 338429.

PEOPLE v PHILLIPS, No. 156853; Court of Appeals No. 340105.

PEOPLE v SIERADZKI, No. 156873; Court of Appeals No. 333245.

SKALNEK v SKALNEK, No. 156874; Court of Appeals No. 333085.

PEOPLE v VIDRO, No. 156885; Court of Appeals No. 331250.

PEOPLE v FREDDIE SMITH, No. 156894; Court of Appeals No. 339588.

ACOFF v US BANK NATIONAL ASSOCIATION, No. 156902; Court of Appeals No. 332717.

PEOPLE v DEMOTT, No. 156911; Court of Appeals No. 332826.

GALLIVAN v DBMJ REHABILITATION SERVICES PLLC, No. 156912; Court of Appeals No. 331832.

PEOPLE v FOSTER, No. 156942; Court of Appeals No. 340182.

PEOPLE v LASSETTI, No. 156943; Court of Appeals No. 332680.

STEFFY v THE BOARD OF HOSPITAL MANAGERS OF HURLEY MEDICAL CENTER, No. 156953; Court of Appeals No. 333945.

PEOPLE v TRAFFORD, No. 157017; Court of Appeals No. 340429.

PEOPLE v MELENDEZ, No. 157035; Court of Appeals No. 332106.

PEOPLE v DENNIS ANDERSON, No. 157039; Court of Appeals No. 334257.

FORD v WOODWARD TAP, INC, No. 157050; Court of Appeals No. 332473.

PEOPLE v CONNOLLY, No. 157054; Court of Appeals No. 333703.

JOE v KEARN, No. 157058; Court of Appeals No. 333643.

BARASH v YALDO, No. 157059; Court of Appeals No. 332705.

PEOPLE v ORLANDO BROWN, No. 157061; Court of Appeals No. 333927.

PEOPLE v UNDERWOOD, No. 157081; Court of Appeals No. 340466.

PEOPLE v LAMOREAUX, No. 157085; Court of Appeals No. 340264.

HEDRICK v DEPARTMENT OF CORRECTIONS, No. 157090; Court of Appeals No. 335489.

PEOPLE v ECHOLS, No. 157103; Court of Appeals No. 334736.

In re WEINGRAD ESTATE, No. 157108; Court of Appeals No. 341107.

PEOPLE v SYKES, No. 157125; Court of Appeals No. 335384.

PEOPLE v WEBSTER, No. 157135; Court of Appeals No. 333933.

PEOPLE v CIAVONE, No. 157142; Court of Appeals No. 339097.

PEOPLE v MATTHEW WOOD, No. 157148; Court of Appeals No. 333944.

PEOPLE v WARFORD, No. 157152; Court of Appeals No. 334997.

PEOPLE v KULHANEK, No. 157157; Court of Appeals No. 338832.

PEOPLE v BETCKE, No. 157161; Court of Appeals No. 340983.

PEOPLE v BURCH, No. 157163; Court of Appeals No. 333015.

PEOPLE v XENAKIS, Nos. 157165 and 157166; Court of Appeals Nos. 333184 and 333185.

PEOPLE v FIELDS, No. 157168; Court of Appeals No. 333931.

PEOPLE v HUSBAND, No. 157171; Court of Appeals No. 333432.

PEOPLE v WALTON, No. 157188; Court of Appeals No. 334882.

PEOPLE v HODGES, Nos. 157192 and 157193; Court of Appeals Nos. 341224 and 341225.

RAINBOW CONSTRUCTION, INC v HOWELL TOWNSHIP, Nos. 157206, 157207, 157208, and 157209; Court of Appeals Nos. 332621, 333336, 335140, and 335142.

PEOPLE v ROWLEY, No. 157211; Court of Appeals No. 340655.

BAK v EASTPOINTE RADIOLOGISTS, PC, No. 157213; Court of Appeals No. 341457.

STATE TREASURER v KENNEDY, No. 157221; Court of Appeals No. 336202.

PEOPLE v KUSHAWN MILES, No. 157223; Court of Appeals No. 340340.

PEOPLE v HUBBARD, No. 157224; Court of Appeals No. 340999.

PEOPLE v FULKERSON, No. 157227; Court of Appeals No. 329887.

PEOPLE v CURTIS ANDERSON, No. 157235; Court of Appeals No. 341790.

PEOPLE v LEONARD, No. 157237; Court of Appeals No. 339368.

PEOPLE v JOHANN, No. 157239; Court of Appeals No. 340374.

PEOPLE v ROSA, No. 157244; reported below: 322 Mich App 726.

PEOPLE v BONNO, No. 157254; Court of Appeals No. 335830.

PEOPLE v HALLMAN, No. 157255; Court of Appeals No. 336217.

BOWEN v ALPENA REGIONAL MEDICAL CENTER, No. 157263; Court of Appeals No. 334620.

ORAM v 6 B's, INC, No. 157264; Court of Appeals No. 332925.

PEOPLE v SANDERS, No. 157270; Court of Appeals No. 335370.

PEOPLE v DICKEN, No. 157283; Court of Appeals No. 322998.

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

PEOPLE v HOVARTER, No. 157284; Court of Appeals No. 341404.

PEOPLE v SANTONYO BROWN, No. 157293; Court of Appeals No. 334810.

PEOPLE v RODRIGUEZ, No. 157294; Court of Appeals No. 335239.

PEOPLE v DAVISON, No. 157304; Court of Appeals No. 339586.

PEOPLE v SAGE, No. 157307; Court of Appeals No. 341676.

PEOPLE v FRITZ, No. 157310; Court of Appeals No. 336111.

PEOPLE v CANADY, No. 157311; Court of Appeals No. 333570.

PEOPLE v WALKER, No. 157320; Court of Appeals No. 335796.

PEOPLE v FICHT, No. 157323; Court of Appeals No. 334021.

PEOPLE v LAMAR CARTER, No. 157329; Court of Appeals No. 335333.

PEOPLE v WITHERSPOON, No. 157333; Court of Appeals No. 334081.

PEOPLE v ROOKUS, No. 157334; Court of Appeals No. 340870.

PEOPLE v COOPER, No. 157338; Court of Appeals No. 333828.

PEOPLE v WRENN, No. 157346; Court of Appeals No. 335209.

PEOPLE v LUCAS-LOPEZ, No. 157348; Court of Appeals No. 337603.

PEOPLE v CROSSETT, No. 157359; Court of Appeals No. 335756.

PEOPLE v MCBRIDE, No. 157402; Court of Appeals No. 333637.

PEOPLE v CHRISTENSEN, No. 157403; Court of Appeals No. 336158.

PEOPLE v ZAHRAIE, No. 157408; Court of Appeals No. 336023.

PEOPLE v JAMES, No. 157411; Court of Appeals No. 333547.

PEOPLE v BEN-YAISRAEL, No. 157424; Court of Appeals No. 336065.

LADUKE v STAPERT, No. 157447; Court of Appeals No. 338239.

In re RADER ESTATE, No. 157450; Court of Appeals No. 335980.

NICHOLSON-GRACIA v GENERAL RETIREMENT SYSTEM OF DETROIT, No. 157469; Court of Appeals No. 334556.

PEOPLE v SIKANAS, No. 157473; Court of Appeals No. 336313.

HAMMOUD v ADVENT HOME MEDICAL, INC, No. 157517; Court of Appeals No. 340502.

PEOPLE v LAYTON, Nos. 157555 and 157556; Court of Appeals Nos. 340379 and 340515.

LOGA v LOGA, No. 157658; Court of Appeals No. 339975.

Leave to Appeal Before Decision by the Court of Appeals Denied July 3, 2018:

LEAPHART v STATE OF MICHIGAN, No. 157529; Court of Appeals No. 343136.

Reconsideration Denied July 3, 2018:

FIGURSKI v TRINITY HEALTH-MICHIGAN, No. 154390; Court of Appeals No. 318115. Leave to appeal denied at 501 Mich 1051.

BISHOP v DEPARTMENT OF CORRECTIONS DIRECTOR, No. 154693; Court of Appeals No. 333757. Leave to appeal denied at 501 Mich 1058.

PEOPLE v JOMIAH WASHINGTON, No. 155007; Court of Appeals No. 334514. Leave to appeal denied at 501 Mich 1034.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LAY, No. 155677; Court of Appeals No. 335408. Leave to appeal denied at 501 Mich 975.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SIMMONS, No. 155721; Court of Appeals No. 337140. Leave to appeal denied at 501 Mich 1058.

TOMA v AUTO CLUB INSURANCE ASSOCIATION, No. 155860; Court of Appeals No. 330585. Leave to appeal denied at 501 Mich 976.

In re PETITION OF WAYNE COUNTY TREASURER FOR FORECLOSURE, No. 155889; Court of Appeals No. 337847. Leave to appeal denied at 501 Mich 1029.

PEOPLE v TURNPAUGH, No. 155928; Court of Appeals No. 337233. Leave to appeal denied at 501 Mich 1059.

PEOPLE v KNAPP, No. 155947; Court of Appeals No. 336670. Leave to appeal denied at 501 Mich 1035.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v REED-BEY, No. 156037; Court of Appeals No. 337991. Leave to appeal denied at 501 Mich 1036.

PEOPLE v CAIN, No. 156146; Court of Appeals No. 336623. Summary disposition order entered at 501 Mich 1072.

ARMSTEAD v DERY, Nos. 156477 and 156478; Court of Appeals Nos. 339513 and 339514. Leave to appeal denied at 501 Mich 978.

PEOPLE v CURTIS, No. 156491; Court of Appeals No. 337529. Leave to appeal denied at 501 Mich 1037.

PEOPLE v RUFFIN, No. 156614; Court of Appeals No. 339408. Leave to appeal denied at 501 Mich 1038.

KENNEY v BOSS, No. 156618; Court of Appeals No. 331905. Leave to appeal denied at 501 Mich 1038.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 5, 2018:

In re FERRANTI, Nos. 157907 and 157908; Court of Appeals Nos. 340117 and 340118. The appellants shall file a supplemental brief within 35 days of the date of this order addressing: (1) whether this Court's opinion in *In re Hatcher*, 443 Mich 426 (1993), correctly held that the collateral-attack rule applied to bar the respondent-parents from challenging the court's initial exercise of jurisdiction over the respondents on appeal from an order terminating parental rights in that same proceeding; (2) if not, (a) by what standard should courts review the respondents' challenge to the initial adjudication, in light of the respondents' failure to appeal the first dispositional order appealable of right, see MCR 3.993(A)(1), and (b) what must a respondent do to preserve for appeal any alleged errors in the adjudication, see, e.g., *In re Hudson*, 483 Mich 928 (2009); (3) if *Hatcher* was correctly decided, whether due-process concerns may override the collateral-bar rule, see *In re Sanders*, 495 Mich 394 (2014), and *In re Wangler*, 498 Mich 911 (2015); (4) whether a trial court is permitted to visit a respondent's home to observe its condition, and, if so, what parameters should apply to doing so; and (5) whether a trial court may interview a child who is the subject of child protective proceedings in chambers, and, if so, what parameters should apply to doing so.

In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file supplemental briefs within 21 days of being served with the appellants' brief. The appellees shall also electronically file appendices, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellees' briefs. The parties should not submit mere restatements of their application papers.

The Family Law Section and the Children's Law Section of the State Bar of Michigan, the Legal Services Association of Michigan, and the Michigan State Planning Body for Legal Services are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Granted July 6, 2018:

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION v SECRETARY OF STATE, No. 157925; reported below: 324 Mich App ___. At oral argument the parties shall address whether the proposal at issue is eligible for placement on the November 2018 general election ballot as a voter-initiated constitutional amendment under Const 1963, art 12, § 2, or whether it is a revision to the Constitution and therefore is ineligible for placement on the ballot.

We direct the Clerk to schedule the oral argument in this case for July 18, 2018 at 9:30 a.m. The total time allowed for oral argument shall be 60 minutes: 30 minutes for plaintiffs, and 30 minutes for defendants and intervening defendants, to be divided at their discretion. MCR 7.313(B)(1) and 7.314(B)(1).

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 6, 2018:

PEOPLE v URBAN, No. 156458; reported below: 321 Mich App 198. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the Court of Appeals in *People v Coy*, 243 Mich App 283, 302 (2000), set forth the appropriate standard for the admission of a potential DNA match when it held that "some qualitative or quantitative interpretation must accompany evidence of the potential match," (2) if not, what standard should govern the admission of a potential DNA match, and (3) whether, under the appropriate standard, the potential DNA match was properly admitted in this case, where the expert's report indicated that the match was supported to a "reasonable degree of scientific certainty." In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied July 6, 2018:

PEOPLE v HEWITT-EL, No. 155239; Court of Appeals No. 332946. On March 3, 2018, the Court heard oral argument on the application for leave to appeal the September 15, 2011 judgment of the Court of Appeals. By order of March 30, 2018, the Court of Appeals opinion was vacated and the case was remanded to that court for reconsideration. On

order of the Court, the Court of Appeals opinion on remand having been received, the application is again considered, and it is denied.

BERNSTEIN, J. (*dissenting*). I respectfully dissent from the order denying leave to appeal. After hearing oral argument on the application for leave to appeal, we vacated the Court of Appeals opinion and remanded the case to the Court of Appeals for reconsideration. In particular, we directed the Court of Appeals to determine whether the defendant is entitled to relief under MCR 6.508(D).

In this case, defendant raised substantive claims of ineffective assistance of counsel, arguing that his trial counsel had failed him in numerous ways. On remand, the Court of Appeals concluded that trial counsel's performance had been defective only in his handling of an MRE 609 issue; this was in contrast to the trial court's conclusion that trial counsel had also erred by failing to investigate or call potential alibi witnesses as well as potential medical experts. The Court of Appeals determined that the trial court had clearly erred by finding that trial counsel had erred in these additional respects. In so holding, the Court of Appeals credited trial counsel's testimony at the evidentiary hearing and found that trial counsel's strategy was reasonable.

I write separately because it seems clear to me that the Court of Appeals is the one that has committed legal error here, not the trial court. The Court of Appeals refers to ample, well-grounded caselaw for the proposition that appellate courts should not " 'second-guess [defense counsel's] strategic decisions with the benefit of hindsight.' " *People v Hewitt-El (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued May 8, 2018 (Docket No. 332946), p 7, quoting *People v Dunigan*, 299 Mich App 579, 590 (2013). However, in giving trial counsel deference, the Court of Appeals completely fails to acknowledge the deference it owes to the trial court's factual findings.

"Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). As this Court has previously stated, "if resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, we will defer to the trial court, which had a superior opportunity to evaluate these matters." *People v Sexton (After Remand)*, 461 Mich 746, 752 (2000). Moreover, in this case, the same judge presided over both the trial and the post-conviction evidentiary hearing, and was thus the only one who had the opportunity to assess the credibility of all of the relevant witnesses.

Curiously, despite the fact that the clear-error standard of review is as well settled as the standard of review that applies to ineffective assistance of counsel claims, at no point in its opinion does the Court of Appeals give the trial court's factual findings the deference they are due. Although lip service is paid to the notion that factual findings are only clearly erroneous "if the reviewing court, upon review of the entire record, 'is left with a definite and firm conviction that a mistake has been made,' " *Hewitt-El*, unpub op at 4, quoting *People v McSwain*, 259 Mich App 654, 682 (2003), the Court of Appeals completely fails to engage in any analysis of how the trial court's findings were clearly erroneous.

Despite noting that review of the entire record is warranted, the Court of Appeals only focuses on trial counsel's self-serving testimony,[1] neglecting the parts of his testimony that were vague, inconsistent, and found not to be credible by the trial court. Although caselaw instructs that factual findings are only clearly erroneous when an appellate court is left with a definite and firm conviction that a mistake has been made, the Court of Appeals does not begin to explain how the trial court's credibility finding was mistaken in the first place, much less how the Court of Appeals is possessed of the definite and firm conviction thereof. The Court of Appeals opinion fails to even acknowledge the trial court's contrary credibility determination; instead of grappling with the proper standard of review, the Court of Appeals effortlessly glides right over what it leaves out, acting as if it is merely filling a space where nothing previously existed.

That the Court of Appeals disagrees with the trial court's credibility determination seems clear; what is less clear is where in the law the Court of Appeals finds the authority to substitute its own credibility determination for that of the trial court. Because I would apply our well-settled caselaw and the plain and unambiguous language of our court rules to the facts of this case, I would find that trial counsel's performance was deficient in multiple regards.

Despite having previously noted that "[a]llowing the jury to learn that defendant had previously been convicted of armed robbery five times substantially increased the risk of unfair prejudice to defendant, particularly where defendant was presently charged with armed robbery," *Hewitt-El*, unpub op at 6-7, when addressing whether trial counsel's performance was prejudicial, the Court of Appeals merely notes that the prosecution had a strong case. No mention is made of this substantial risk of unfair prejudice. Here, the prior convictions that were admitted were identical to the one defendant was being tried for, and were thus highly prejudicial. See *People v Snyder*, 301 Mich App 99, 106 (2013). Excluding these prior convictions would have materially improved defendant's odds of acquittal, especially where defendant was the sole witness in his own defense, and his credibility was thus of utmost importance. I would find that defendant has established a reasonable likelihood that, but for trial counsel's deficiency, he would have been acquitted. See MCR 6.508(D)(3)(b)(i).

MCCORMACK, J., joined the statement of BERNSTEIN, J.

Reconsideration Denied July 6, 2018:

MICHIGAN HEAD & SPINE INSTITUTE, PC v BEAUMONT HEALTH, No. 157289; Court of Appeals No. 340273. Leave to appeal denied at 501 Mich 1084.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 13, 2018:

PEOPLE v PIERSON, No. 156720; reported below: 321 Mich App 288. On

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[1] The trial court specifically noted: "While [trial counsel] believes heperformed strategically and without errors, this Court finds that his opinion of himself is inflated and unreasonable and if not for the

order of the Court, the application for leave to appeal the September 12, 2017 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1).

We further order the Washtenaw Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint the State Appellate Defender Office, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court.

The appellant shall file a supplemental brief within 42 days of the date of the order appointing counsel addressing whether: (1) defendant was denied the right to a fair trial when the trial court informed the jury that his confession to police had already been reviewed by the court and had been held admissible, see *People v Kincaid*, 136 Mich App 209, 215-216 (1984); *People v Gilbert*, 55 Mich App 168, 172-173 (1974); and (2) to the extent that the trial court erred, whether that error was harmless, *People v Corbett*, 97 Mich App 438, 442 (1980); *People v Mathis*, 75 Mich App 320, 324 (1977). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied July 13, 2018:

HEMPHILL v SULEIMAN, No. 155464; Court of Appeals No. 335351.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal and instead would grant leave. This case was held in abeyance pending a decision in *Jendrusina v Mishra*, 500 Mich 987 (2017), which involved the application of the "discovery rule" set forth in MCL 600.5838a(2) ("[A]n action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later."). Although this Court in a divided decision voted to deny leave to appeal in *Jendrusina*, I continue to believe that the Court of Appeals seriously misapplied the discovery rule in that case. See *Jendrusina v Mishra*, 501 Mich 958 (2018) (MARKMAN, C.J., dissenting). In my judgment, granting leave to appeal in this case would afford us the opportunity to thoroughly assess the proper contours

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numerous aforementioned errors, there is a reasonable probability that the proceeding would have been different."

of the discovery rule. For these reasons, I would grant leave to further consider and delineate the proper application of the discovery rule.

ZAHRA and WILDER, JJ., joined the statement of MARKMAN, C.J.

SMITH v HENRY FORD HEALTH SYSTEM, No. 155679; Court of Appeals No. 335910.

WILDER, J., did not participate because he was on the Court of Appeals panel.

SMITH v HENRY FORD HEALTH SYSTEM, No. 155690; Court of Appeals No. 335921.

WILDER, J., did not participate because he was on the Court of Appeals panel.

ZASTROW v CITY OF WYOMING, No. 156643; Court of Appeals No. 331791.

MCCORMACK, J. (*dissenting*). I would have granted leave to appeal to consider whether the plaintiff's union breached the duty of fair representation when it concluded, apparently without considering the proper legal standard, that the plaintiff's claim lacked merit.

Plaintiff William Zastrow worked for the defendant city of Wyoming as the assistant director of the Public Works Department for 13 years. Until he was fired in 2015, Zastrow had never been disciplined, had a good work record, and received a 100% rating on his last performance review. Zastrow's termination occurred after he made comments to a coworker, Randy Colvin, expressing frustration about police officers' repeated violations of a city policy that required them to remove their service weapons from their vehicles before bringing them to the garage for maintenance. Colvin had just discovered a semiautomatic rifle left in the back of a police cruiser he was working on. Colvin gave the gun to Zastrow, who made the gun safe and gave it back to Colvin to place in a secure locker. While he was still holding the gun, Zastrow complained about the frequent violations of the policy and allegedly said something like "Maybe now I will get some respect," referencing the gun. Colvin stated that he did not feel threatened. He described Zastrow's demeanor as "bummed out" and "worried." Colvin described the incident to other city employees, however, and those employees complained to city management.

The matter was eventually referred to the Department of Public Works for an investigation. After the investigation, Zastrow was fired. The city cited two grounds for termination: (1) violating a city rule that prohibited threatening statements made to another city employee at work, and (2) violating a city rule that prohibited dishonesty during an investigation.

Zastrow asked his union to pursue a grievance on his behalf. The union filed a notice of intent and formed an ad hoc committee to investigate. The grievance committee report recommended against pursuing a formal grievance. The union gave two reasons for not proceeding to arbitration. First, the union did not want to set a precedent that it would be expected to arbitrate other cases in the future. And second, the union concluded that there was a low likelihood that it could prevail at arbitration.

Zastrow brought this action claiming, in relevant part, that the union breached its duty of fair representation when it dismissed plaintiff's formal grievance without proceeding to arbitration. The trial court granted defendants' motions for summary disposition under MCR 2.116(C)(10) and dismissed the lawsuit. A divided panel of the Court of Appeals affirmed in an unpublished decision. Zastrow sought leave to appeal that decision here.

The duty of fair representation at least includes the following three responsibilities: "(1) 'to serve the interests of all members without hostility or discrimination toward any', (2) 'to exercise its discretion with complete good faith and honesty', and (3) 'to avoid arbitrary conduct'." *Goolsby v Detroit*, 419 Mich 651, 664 (1984) (citation omitted). A union has "considerable discretion to decide which grievances shall be pressed and which shall be settled." *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 146 (1973). "[A]n individual member does not have the right to demand that his grievance be pressed to arbitration . . . . When the general good [of the union's membership] conflicts with the needs or desires of an individual member, the discretion of the union to choose the former is paramount." *Id*.

The determination of what constitutes a frivolous grievance is a matter of the union's discretion. But the duty of fair representation requires that the union exercise its discretion in good faith, avoiding conduct that is arbitrary, unreasoned, or irrational. Here, the Court of Appeals majority concluded that the union's decision was based on its determination that the grievance lacked merit and would not serve the union's best interest, and that Zastrow thus failed to show that the union's decision was made in bad faith. The Court of Appeals majority seems to have ruled that because the union went through the motions of an investigation, the court must defer to its conclusions. Yet that is not our standard. "[A] union, through arbitrary conduct and absent any bad faith, can breach its duty of fair representation." *Goolsby*, 419 Mich at 679. "In addition to prohibiting impulsive, irrational, or unreasoned conduct, the duty of fair representation also proscribes inept conduct undertaken with little care or with indifference to the interests of those affected." *Id*.

Here, the committee tasked with evaluating the individual merits of Zastrow's case did not have any experience with arbitration, had not been given any instructions, and had not considered the legal standards under which the case's merits would be evaluated. As a result, the union appears to have erroneously focused on whether it could convince the *city* to reverse its decision, when the question was whether it could convince a neutral arbitrator. As the dissenting judge pointed out:

> [A] review of the record leads to the conclusion that any attorney moderately skilled at litigation who reviewed the evidence and contractual standards relevant to this grievance would conclude that there was a strong likelihood of success, either of prevailing outright or at least in reducing the sanction.

Zastrow v City of Wyoming, unpublished per curiam opinion of the Court of Appeals, issued September 5, 2017 (Docket No. 331791) (SHAPIRO, J., dissenting), p 5.

Lowe holds that a union has discretion to abandon a claim it determines to be frivolous or that conflicts with the interests of its general membership. *Lowe*, 389 Mich at 146. But it must exercise that discretion " 'with complete good faith and honesty, . . . avoid[ing] arbitrary conduct.' " *Goolsby*, 419 Mich at 664 (citation omitted). It is not clear to me whether the seemingly unreasoned investigation undertaken here by the union's grievance committee could satisfy that standard. It is just as arbitrary to decide a claim after an inadequate or unreasoned investigation as it is to conduct no investigation at all. Moreover, I am troubled by the union's claim that it served "the general good" of its membership to avoid setting a precedent that it would arbitrate other cases in the future. Although a union could indeed avoid arbitration of meritless claims by refusing to arbitrate *any* claim, such an approach hardly qualifies as representation, much less fair representation. Accordingly, I would have granted leave to consider whether there was a question of fact as to whether the union met its duty of fair representation.

VIVIANO, J., joined the statement of MCCORMACK, J.

Leave to Appeal Denied July 20, 2018:

PEOPLE V LOVE, No. 155545; Court of Appeals No. 329217.

ZAHRA, J. (*dissenting*). In this case, a jury convicted defendant of three counts of first-degree criminal sexual conduct and four counts of assault with intent to commit criminal sexual conduct for his role in the gang-rape of a young woman at a party. Following an evidentiary hearing, the trial court granted defendant a new trial based solely on defendant's claim that his counsel abandoned him during trial. The Court of Appeals reversed and remanded for the trial court to consider ineffective assistance of counsel under the correct standard, i.e., whether defendant was prejudiced. The trial court conducted a second evidentiary hearing. Afterward, the court issued an opinion from the bench granting defendant a new trial. In doing so, the court assumed that defendant's newly discovered witness, Darrell Gleese, was credible because he lacked a criminal record. The court failed to properly evaluate Gleese's credibility in light of the evidence presented during the entirety of the proceedings. Instead, the court injudiciously found him credible simply because he lacked a criminal record. I would remand to a different judge to evaluate Gleese's credibility in light of the facts presented at trial.

In my view, the trial court entirely failed in its obligations to determine whether Gleese's testimony was believable when compared to the evidence already presented against defendant. As in all claims of ineffective assistance of counsel, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]"[1] In *People v*

[1] *People v Mitchell*, 454 Mich 145, 167 (1997).

Toma,[2] this Court explained that even though the defendant's testimony offered the only direct rebuttal of the prosecutor's theory, an effective rebuttal could only have been accomplished if the testimony was believed. That is similar to the issue in the present case. Here, the trial court stated in its ruling, "There is a reasonable probability of [a different outcome] because [Gleese] would have called into question the testimony of the prosecution's witnesses . . . ." Previously, the court had mentioned that there was nothing to directly impugn Gleese's credibility, but the court seemed to reach that conclusion based solely on Gleese's lack of a criminal record. The court conceded that "there [were] other questions that could be raised if he took the stand . . . . So timing would have been important at the time that the trial took place concerning whether or not Mr. Gleese's testimony was going to be believed . . . ." But the court made no attempt to articulate why Gleese should be believed in the first place, given the overwhelming evidence presented at trial that called his credibility into question. In other words, while the court acknowledged that "[t]he only attack on [Gleese's] credibility conceivably would have been that his testimony may have been inconsistent with the testimony of the prosecution's witnesses presented during the course of the trial," the court absolutely failed to evaluate whether Gleese should even be believed in light of that evidence.

Gleese's credibility was highly questionable and certainly warranted some examination. Direct conflicts between Gleese's testimony and testimony of the other witnesses, along with a lack of corroborating evidence, raised questions as to whether Gleese was even at the party, let alone whether his testimony could be believed.

There was no testimony from other witnesses that suggests Gleese was at the party; in fact, testimony from the trial suggests that Gleese was not at the party. At trial, Destiny, Gina, Alison, and the victim were the only four party attendees to testify. They all agreed that about 10 to 15 people attended the party. Gina specified that there were eight boys; she knew defendant, Dantraz, Dalvyn, and Durell, plus there were four boys whom she did not know. This fits neatly with Alison's testimony that in addition to the four boys Gina named, Craig, Joe, Dre, and Zay attended the party. Destiny testified that in addition to herself, Gina, Alison, Shankey, the victim, Lakiya, Lenay, and Gina's friend (Stocey) were the female attendees. In their combined testimony, the witnesses actually named 16 people at the party.[3] Significantly, Darrell Gleese was not mentioned by any of the witnesses. Given the consensus estimate of 10 to 15 party attendees, it seems highly unlikely that anyone went unnamed. It is even more suspicious that Gleese claimed to have come with his friend Kenny and observed a man named Stan at the party, since they were not mentioned by any of the other witnesses either.

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[2] *People v Toma*, 462 Mich 281, 308 (2000).

[3] Gina's boyfriend, Courtney Ellison, and the victim's friend, someone named Juan, stopped by after the party, but that was after the alleged rape.

Further questions are raised about Gleese's presence at the party by his seeming lack of knowledge about basic facts of the evening. Gleese testified that he did not remember playing any games. Every other witness testified that everyone at the party played a game called "I Never." By all other accounts, this game immediately preceded the victim's going into the bedroom, so it seems unsettling that Gleese would not remember it, even when specifically asked about it. Additionally, Gleese, who claims to have been at the apartment from 11 p.m. until 2 a.m. or 3 a.m., testified that he never saw defendant leave the apartment. There is evidence (a text message and witnesses) indicating that defendant left the apartment around 1:10 a.m. Finally, Gleese testified that Gina never left the party. This again conflicts with the testimony of other witnesses who said that Gina left to take a friend home and later returned with her boyfriend. There is also a phone record that Destiny called Gina at 1:46 a.m., which suggests that she was not in the apartment at that time.

Even if Gleese did attend the party, there are other reasons to question his credibility. First, Gleese claimed to have spoken with a male attorney before the original trial. Two attorneys represented defendant, and both testified that only the female attorney, Ms. Palmore-Bryant, communicated with Gleese. Second, Gleese initially said that defendant fell asleep around 1 or 1:30 a.m., but later said it was 12 a.m. Gleese's testimony that the victim was still in the bedroom when he left the party (between 2 and 3 a.m.) is also dubious. Evidence presented at trial shows that the victim's mother called 9-1-1 before 3 a.m. The victim saw her mother in person before the call was made, so she must have left the bedroom by that point. It is possible to fit this on Gleese's time line, but barely. Finally, Gleese claims to have attended every day of defendant's trial. Despite this, and claiming to have exculpatory testimony, Gleese did not make defendant or defendant's attorneys aware of his presence. Further, defendant's attorney, Palmore-Bryant, claimed to have looked for him in the courthouse, but she did not find him. While again this is possible, it seems incredible.

As this Court explained in *Toma*, the posited testimony needs to be believed in order to make a different outcome reasonably probable. There are many red flags raised by Gleese's testimony that warrant a closer look. While I cannot say for certain that Gleese's testimony is false, I believe that the trial court has not provided any factual basis to conclude that he should be believed. MCR 6.431(B) provides that "the court may order a new trial on any ground that would support appellate reversal of the conviction" and that the court "must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record." And while the Court of Appeals properly noted that "[t]he trial court was present throughout the trial and had a 'special opportunity . . . to judge the credibility of the witnesses' and the other evidence,"[4] the trial court's assumption that

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[4] *People v Love (After Remand)*, unpublished per curiam opinion of the Court of Appeals, issued February 7, 2017 (Docket Nos. 324992 and 329217), p 6, citing MCR 2.612(C) and MCR 6.001(D).

Gleese was credible based on lack of a criminal record does not implicate this special opportunity. I find the court's failure to assess Gleese's testimony in light of evidence presented during the trial very troubling. Accordingly, I believe this case should be remanded to a different judge to evaluate Gleese's credibility in light of the facts presented at trial.

WILDER, J., joined the statement of ZAHRA, J.

MARKMAN, C.J., would remand to the trial court for an evidentiary hearing to reassess the credibility of the newly discovered witness for the reasons set forth by Justice ZAHRA in his dissent, except that he would not remand to a different trial judge.

WILLIAMS v LEWIS, No. 156972; Court of Appeals No. 332755.

MCCORMACK, J. (*dissenting*). I respectfully dissent from the Court's leave denial. I would have granted leave to consider whether the Court of Appeals properly analyzed the plaintiff's wrongful-death claim in its opinion reversing the trial court's denial of the defendant's motion for summary disposition.

Plaintiff Sharita Williams was shot and killed by an ex-lover and coworker, Myron Williams, at their workplace.[1] Sharita was a receptionist at the Park Family Healthcare clinic. Myron was a maintenance worker at the clinic. Sharita began a romantic relationship with Myron in March of 2012 but eventually broke it off. Myron responded by stalking and threatening her.

In April 2013, in response to Myron's stalking and threats, the Wayne Circuit Court issued a personal protection order (PPO) ordering Myron, among other directives, to avoid coming to the clinic between 9:00 a.m. and 5:00 p.m. Sharita discussed the PPO and the reasons it was issued with coworkers, including security guard Consuella Lewis. Lewis worked for Advance Security, a company that was contracted to protect Park Family Healthcare. Sharita asked Lewis to serve the PPO on Myron on April 8, but she refused. Sharita told Lewis that the PPO barred Myron from entering the clinic between 9 a.m. and 5 p.m. She also told Lewis that Myron shared nude pictures of her with her acquaintances, broke into her home, and stole her car, and that she had to move into a new home because Myron was harassing her. Lewis also knew that Myron carried a concealed pistol and always brought it to work.

The next morning, Lewis was on duty at 9:00 a.m. when Myron entered the building. Lewis thought it was "weird" for Myron to walk up to the building—he usually drove his truck—but did nothing to stop him as he entered the clinic through the employees' door. Lewis recalled there was nothing unusual about his appearance, although another witness said Myron looked like "trouble." A minute later, Myron shot and killed Sharita and then himself.

Sharita's estate filed a wrongful-death action against Lewis and Advance Security. The defendants filed a motion for summary disposition under MCR 2.116(C)(10). The trial court denied it, but the Court of Appeals reversed on an interlocutory basis in an unpublished per

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[1] Sharita and Myron were not related.

curiam opinion. The panel held that Advance Security owed no duty to Sharita because her employer, which contracted with Advance Security, had no duty to protect her from Myron's criminal acts.

Generally, there is no duty to protect a person from the criminal acts of a third party. See *Bailey v Schaaf*, 494 Mich 595, 604 (2013). But "a landlord has a duty to respond by reasonably expediting police involvement where it is given notice of a specific situation occurring on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." *Id*. at 614 (cleaned up). The panel relied on this principle to hold that, "given the comparability of the employer-employee relationship to the landlord-tenant and business invitor-invitee relationships, . . . the same limited duty applies [to employer-employee relationships]." *Williams Estate v Lewis*, unpublished per curiam opinion of the Court of Appeals, issued November 21, 2017 (Docket No. 332755), p 5. As the quoted language suggests, the decision to liken the employer-employee relationship to the landlord-tenant relationship was a new doctrinal development. And maybe it is a sound development, but I believe it warrants closer review from this Court. There may be reasons to treat the two relationships differently.

In addition, assuming *Bailey v Schaaf* is the correct standard for evaluating this claim, I am not confident that the Court of Appeals properly reversed the trial court's decision to deny summary disposition. A party is only entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183 (2003). A trial court's grant of summary disposition is reviewed de novo. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162 (2011). In *Bailey*, the defendant-landlord hired security guards to protect guests in their apartment complex. A man entered the complex with a handgun and threatened to kill someone, and a tenant informed security. Security did not respond, and the man shot the plaintiff in the back, paralyzing him. The plaintiff sued both the landlord and the security company. *Bailey*, 494 Mich at 600-601. This Court held that a landlord has a duty to reasonably expedite police involvement when given notice of imminent harm to an identifiable invitee, *id*. at 615-616, and this duty was imputed to the security guards through their agency relationship with the landlord, *id*. at 618. Because the shooter plainly posed a danger to the plaintiff, the guards had a duty to notify the police. *Id*.

Although there is no evidence that Myron entered the workplace announcing his intent to kill, Lewis knew that there was a court order preventing him from entering the workplace at the time he did so, that the court order was entered because he had been stalking and harassing Sharita and had committed past crimes against her, and that he had made a habit of carrying a firearm. Given all of this, I question whether the trial court erred by denying the defendant's motion for summary disposition. I do not see an error in the court's determination that there was a question of material fact as to whether these circumstances would cause "a reasonable person to recognize a risk of imminent harm to an identifiable invitee." *Id*. at 614.

I would have granted leave to give these questions full consideration. BERNSTEIN, J., would grant leave to appeal.

Superintending Control Denied July 20, 2018:

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 157137.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 157421.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 157452. On order of the Court, the complaint for superintending control is considered, and relief is denied, because the Court is not persuaded that it should grant the requested relief. We further find that the plaintiff is a vexatious litigator under MCR 7.316(C)(3). We direct the Clerk of this Court not to accept any further filings from plaintiff in any matter against the Attorney Grievance Commission without the filing fee required by MCR 7.319.

Order Vacating the Imposition of Costs Entered July 20, 2018:

PEOPLE v HILL, No. 154716; Court of Appeals No. 333566. By order of January 3, 2018, this case was remanded to the Wayne Circuit Court and costs were imposed on attorney Suzanna Kostovski in the amount of $500. On the Court's own motion, we vacate that part of the order imposing costs on attorney Kostovski.

Summary Disposition July 25, 2018:

BLACKWELL v FRANCHI, No. 155413; reported below: 318 Mich App 573. On March 6, 2018, the Court heard oral argument on the application for leave to appeal the January 31, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we remand this case to the Court of Appeals to determine whether the defendants had a duty to warn the plaintiff of the condition. The panel did not consider the defendants' other arguments, which could have provided alternative grounds to affirm the trial court's grant of summary disposition, notwithstanding its conclusion—which we do not disturb—that questions of fact remain as to whether the particular condition was open and obvious.

As an initial matter, we agree with both lower courts that the plaintiff was a licensee. In *Preston v Sleziak*, we adopted the Restatement (Second) of Torts' articulation of the duty owed by a premises possessor to licensees:

> "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
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> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
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> (c) the licensees do not know or have reason to know of the condition and the risk involved." [*Preston v Sleziak*, 383 Mich 442, 453 (1970), quoting Restatement Torts, 2d, § 342, p 210, overruled in part on other grounds by *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591 (2000).]

"The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit." *Stitt*, 462 Mich at 596. In short, the defendants could satisfy their duty of care to a licensee like the plaintiff by warning of any conditions that a licensee would not have reason to know of and that posed an unreasonable risk of harm; beyond this duty to warn of certain conditions, the defendants had no affirmative duty to inspect the premises or to make the premises safe for licensees. If the particular condition here did not give rise to a duty to warn, the defendants cannot be held liable.

On the other hand, "the 'no duty to warn of open and obvious danger' rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95-96 (1992). If the defendants had no duty to warn of the condition because it did not " 'involve[] an unreasonable risk of harm to [the plaintiff]' " or was not one that the defendants " 'should expect that [the plaintiff would] not discover,' " the plaintiff's prima facie negligence claim fails, regardless of the openness and obviousness of the condition. *Preston*, 383 Mich at 453, quoting Restatement, § 342. A question of fact as to the openness and obviousness of the step is irrelevant if there is no prima facie claim. There is no need to "attack[] the duty element" if the defendants owed no duty in the first place. See *Riddle*, 440 Mich at 96.

Although the defendants did argue that *if* the condition was one for which they owed a duty to warn licensees, it was nevertheless open and obvious, and the trial court granted their motion for summary disposition on that basis, that was not the only basis for their summary disposition motion. The defendants have also consistently presented another argument: that the particular condition complained of here—a single step in a dark room—was not a condition that a licensee would not know of or have reason to know of that posed an unreasonable risk of harm such that the defendants had a duty to warn.

If the defendants prevail on this claim, the trial court's ruling should be affirmed on this alternative basis. In other words, the panel should determine whether the defendants owed a duty to the plaintiff with respect to this particular condition regardless of whether the condition was open and obvious. See *Preston*, 383 Mich at 453.

Accordingly, we remand this case to the Court of Appeals for consideration of this issue it has not yet addressed: whether defendants owed plaintiff a duty to warn about the step because the plaintiff did not " 'know or have reason to know of the condition and the risk involved,' " and it involved " 'an unreasonable risk of harm,' " and the defendants should not have expected that a licensee like the plaintiff would " 'discover or realize the danger . . . .' " *Id.*, quoting Restatement, § 342. We do not retain jurisdiction.

MCCORMACK, J. (*concurring*). I concur in the Court's order remanding this case to the Court of Appeals to address the defendants' remaining summary disposition claims, which could provide an alternative basis for affirming the trial court ruling. I agree that questions of fact remain as to whether the particular condition—an 8-inch step in a dark room—was open and obvious, and that that question may not be material if the defendants had no duty to warn the plaintiff for the other reasons they have given.

I write briefly to respond to the dissent. A lot of the dissent's concerns may be addressed by the Court of Appeals in deciding the defendants' other claims within our traditional doctrinal framework. Indeed, settled doctrine provides an avenue to reach the same result as the dissent would have us reach today where the record so supports. But I want to clarify what I believe that inquiry should look like, and why I believe the dissent's alternative approach departs from well-established doctrine.

First, the dissent relies mistakenly on principles of comparative negligence to define the scope of the defendants' duty to warn. I am sympathetic to the dissent's view that a social host should expect guests to behave prudently and should not be held liable for their negligence. And there is room for the dissent's underlying concerns to do work in a proper analysis of duty. The Restatement (Second) of Torts, which we adopted in *Preston*, provides that a possessor has a duty to warn of a condition if the condition "involves an unreasonable risk of harm to . . . licensees" and the possessor "*should expect that they* [*a licensee*] *will not discover or realize the danger* . . . ." 2 Restatement Torts, 2d, § 342, p 210 (emphasis added). This principle would support the dissent's contention that "[d]efendants had every right to expect that plaintiff was such a prudent person who would turn on the light and see the step, or at a minimum decline to walk into a darkened room without even the most cursory effort to determine whether it was safe to do so."

And yet, this element of the duty to licensees does not mean that a host has no duty whatsoever to warn a social guest about any condition in a dark room (no matter how dangerous) because the host is entitled as a matter of law to expect guests to take the affirmative step of turning on a light switch to discover hazards. To be sure, a reasonably prudent person, walking through a strange house, might turn on the light before entering a dark room. And when a guest fails to do so, that failure may very well be relevant to apportioning damages under comparative-negligence principles. But it will not be a reason for a court to find as a matter of law that there is no duty to the guest at all, no matter what dangerous condition awaited her.

The Restatement contemplates that a licensee will discover "conditions which are perceptible by his senses, or the existence of which can be inferred from facts within the licensee's knowledge." Restatement, § 342, comment *f*, p 212. Some conditions in a dark room will be more predictable than others—for example, it might be a fact within the licensee's knowledge that "mudrooms . . . are [often] adjacent to garages" and that "garages are often themselves not level with the home" (these "facts" seem to be within the dissent's knowledge, curiously). The Restatement's standard thus assigns the homeowner a duty commensurate with the hazard: a slipper on the floor in a dark mudroom is different than an open shark tank in that same dark room. I trust the Court of Appeals can evaluate based on the record where the 8-inch step falls on that continuum.

The dissent, in contrast, would create some kind of strange per se rule: defendants as a matter of law do not owe a duty to warn licensees of any danger that lurks in a dark room if there is a light switch nearby. Perhaps unsurprisingly, this rule does not map onto any argument that the defendants made in this case, and it would constitute a new approach to premises doctrine.[1] Under it, courts could decide for themselves as a legal matter that if a plaintiff appeared at all negligent (to a judge, unmoored from a factual record), she cannot recover and her suit is dismissed.

Such a rule also would resurrect a judicial version of our long-dead contributory negligence regime under the camouflage of a duty analysis. But of course such an approach does not comport with the established understanding of negligence doctrine. The dissent owns its doctrinal contortion: "Although *Brusseau* was decided on the basis of contributory negligence, I believe that it would today likely be resolved on the basis of duty."

But we judges are not authorized to apply contributory negligence principles by recasting them as duty. The Legislature has foreclosed that approach. Michigan, like most other jurisdictions, went from a contributory negligence jurisdiction to a comparative fault jurisdiction decades ago—comparative fault was judicially adopted in 1979 in *Placek v City of Sterling Hts*, 405 Mich 638 (1979), and the Legislature specifically adopted comparative fault with 1982 PA 147. It was codified in its present form in 1995 in MCL 600.2959. The Legislature, by requiring that a plaintiff's recovery be reduced by the percentage of her own negligence, mandated that a plaintiff's negligence could not be used

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[1] This new approach would not result in less litigation, of course. Just different litigation. Rather than litigating the dangerousness of the condition on the land, the parties instead will wage a war of light-switch litigation. We could look forward to adjudicating questions about where the light switch was, whether it was easily findable, and what a licensee should have to do to find it. And it begins to look like an affirmative duty to ensure that there is an accessible and working light switch. So much for relief for property owners.

as a basis to dismiss a suit altogether.[2] And we have clearly held that the Legislature's adoption of comparative fault did not abrogate the common-law, status-based duties of care of premises possessors:

> Once a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question for the jury. *The jury* must decide whether the defendant breached the legal duty owed to the plaintiff, that the defendant's breach was the proximate cause of the plaintiff's injuries, and thus, that the defendant is negligent.
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> * * *
>
> Conversely, comparative negligence is an affirmative defense. Michigan adopted this standard to promulgate a "fair system of apportionment of damages." *Under this doctrine, a defendant may present evidence of a plaintiff's negligence in order to reduce liability*. [*Riddle*, 440 Mich at 96, 98 (citations omitted; emphasis added).]

We went on to quote the reasoning of the Illinois Supreme Court on the same question from *Ward v K mart Corp*, 136 Ill 2d 132, 145 (1990), which held:

> In a common law negligence action, before a plaintiff's fault can be compared with that of the defendant, it obviously must first be determined that the defendant was negligent. It is fundamental tort law that before a defendant can be found to have been negligent, it must first be determined that the defendant owed a legal duty to the plaintiff.

In short, we must operate under the comparative fault regime the Legislature imposed. Comparative fault is a rule of decision for damages. It does not define the contours of the defendant's legal duty.

Second, while the dissent does not cite much of the evidence from the deposition testimony, a court considering a motion under MCR 2.116(C)(10) is obligated to evaluate it. The dissent proceeds as if a

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[2] Michigan is (mostly) a pure comparative-negligence jurisdiction. That is, even if a plaintiff is 99% at fault, she can still recover 1% damages. The one exception to this is for noneconomic damages—like compensation for pain and suffering, emotional distress, or loss of enjoyment—which are barred whenever the plaintiff is more at fault than anyone else. MCL 600.2959 ("If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault . . . and noneconomic damages shall not be awarded.").

number of facts are undisputed. For example, the dissent states that "there is nothing to suggest that defendants had reason to expect that plaintiff would not in a timely manner discover the step." But the plaintiff *has* suggested a few reasons: the plaintiff testified in her deposition that the floor of the mudroom appeared level with the wood floor of the hallway; Endia Simmons testified that if she had been the one to enter the mudroom first, she would have fallen, because there was no way to tell any height differential existed; Ebony Whisenant also testified that the floor looked level between the two rooms; and photographs show that the dark floor could make the step difficult to see, even with adequate light.[3] Ultimately, even if evidence clearly weighs in favor of the party seeking summary disposition, it is not the role of courts to weigh evidence in a motion brought under MCR 2.116(C)(10). Instead, a court must consider the evidence in the light most favorable to the nonmovant and determine if reasonable minds could differ in resolving the evidence. MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 120 (1999); *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425 (2008). The lower courts are well equipped to assess the record with the assistance of the parties in evaluating the facts relevant to the remanded claims.[4]

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[3] There are also questions of fact that would be relevant if the dissent's no-duty-if-there-is-a-light-switch rule prevailed: whether the plaintiff would have known which light switch corresponded with the mudroom, how obvious that switch was, whether she should have flipped it. And so on.

[4] While unimportant to resolving this case, I am puzzled by the dissent's view that the open and obvious danger doctrine is only relevant to invitees. I do not follow this doctrinal move. I am aware of no authority that limits the work that the open and obvious danger doctrine can do in the way the dissent views it. We have never held that the open and obvious danger doctrine is limited to invitees. Indeed, the Court of Appeals has routinely applied the doctrine to licensees, and we have not intervened. See, e.g., *Pippin v Atallah*, 245 Mich App 136, 143 (2001) ("[A] possessor of land has no obligation to take any steps to safeguard licensees from conditions that are open and obvious.").

The open and obvious danger doctrine is implicit in the definition of the duty owed to licensees because a premises possessor will never owe a duty to warn licensees of an open and obvious danger. A danger that is open and obvious will always be one a landowner should expect that a licensee should discover.

The Restatement explicitly incorporates the open and obvious danger doctrine as a limit on liability to invitees, who would otherwise be entitled to expect greater protection from the landowner. Comment *a* to § 343 instructs that § 343 "should be read together with § 343 A, which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him . . . . That Section limits the liability here

To reiterate, the proper evaluation of a homeowner's duty to a licensee will take into account the questions that concern the dissent. But no doctrinal contortion is needed to protect property owners from baseless claims. Well-established doctrine will work.

VIVIANO, J., joined the statement of MCCORMACK, J.

MARKMAN, C.J. (*dissenting*). This case concerns an incident that occurred during a Christmas party hosted by defendants and attended by plaintiff. When plaintiff arrived, she went to place her purse for the evening in a small room adjoining the garage. Notwithstanding that the room was dark, plaintiff chose to proceed into the room without turning on the light switch that was immediately adjacent to the entryway. She then lost her balance and fell, injuring herself, when she set foot into the room, which was about 8 inches lower than the hallway. Can defendants

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stated." And Comment *b* to Restatement § 343 offers a detailed explanation of the distinction between the duty owed to licensees and invitees. It concludes:

> As stated in § 342, the possessor is under no duty to protect the licensee against dangers of which the licensee knows or has reason to know. On the other hand, as stated in § 343 A, there are some situations in which there is a duty to protect an invitee against even known dangers, where the possessor should anticipate harm to the invitee notwithstanding such knowledge. [Restatement, § 343, p 217.]

Our court's version of this carveout of the open and obvious danger defense for invitees is the special aspects doctrine. As in the Restatement's treatment, there is no reason that the special aspects carveout for invitees should apply to licensees—a possessor owes a licensee nothing more than a duty to warn, and an open and obvious danger comes as its own warning. The work that the open and obvious danger doctrine can do for both classes of visitors is apples to apples: there is no duty to warn *any* visitor of open or obvious dangers. But the extent of residual duty is oranges. Invitees must still be protected from certain known dangers; but a licensee who encounters an open and obvious danger has received the only protection to which he is entitled under our doctrine—a warning.

I agree with amicus curiae the Michigan Manufacturers Association—a landowner has a duty to warn of dangers she should not expect a licensee to discover, but "[a]ny duty to warn does not apply to dangers that are open and obvious . . . ." The existence of an open and obvious danger *itself* warns guests of a potential hazard. Thus, if a danger is open and obvious, a property owner has no duty to fix it (for invitees) or to warn about it (for licensees). In my view, property owners should be able to rely on the open and obvious danger doctrine no matter who is visiting.

be held liable in premises liability for plaintiff's injuries? I think not and believe this to be a long-settled matter of common law in this state. Accordingly, I respectfully dissent from this Court's order remanding to the Court of Appeals to address the issue of duty because I would instead conclude today that defendants owed no duty. Thus, I would reverse the judgment of the Court of Appeals and reinstate the trial court's grant of summary disposition in favor of defendants.

I. FACTS AND HISTORY

Plaintiff Susan Blackwell attended a December 2013 party at the home of defendants Dean and Debra Franchi. When plaintiff arrived, she was allegedly told by the latter that she could place her purse in a small room to the left, described as the "mudroom" by the parties. There was no light on in the mudroom, and according to plaintiff, the hallway that adjoined the mudroom was "dimly lit." However, there was a light switch immediately next to the entrance. There was an 8-inch step creating a drop-off into the mudroom. Plaintiff, however, in the belief that the mudroom was level with the hallway, walked directly into the mudroom, lost her balance and fell, suffering injuries. Plaintiff had made no effort to turn on the light beforehand or otherwise to check to be certain that it was safe to enter the mudroom.

Plaintiff sued defendants on the basis of premises liability, alleging that defendants breached the duty owed to her as an invitee by failing to "inspect for hazards, dangers and improper conditions of the premises"; "warn[,] advise and instruct persons regarding potentially dangerous conditions on the premises"; and "provide safe, proper and adequate access and egress to the Plaintiff and others similarly situated[.]"[1] Defendants moved for summary disposition, and the trial court, Oakland Circuit Court Judge Colleen O'Brien, granted their motion, concluding at the outset that plaintiff was a licensee and not an invitee. The court then concluded that even if plaintiff was an invitee, defendants were still entitled to summary disposition because "reasonable minds could not differ that the alleged condition here was open and obvious. Moreover, there are no special aspects."

Plaintiff appealed, arguing that she was instead an invitee and that the step was not open and obvious because the hallway floor and the mudroom floor appeared to be level under the lighting conditions confronted. According to plaintiff, defendants were negligent by failing to provide adequate lighting or to warn her that there was a step down into the mudroom. The Court of Appeals reversed and remanded to the trial court for further proceedings in an opinion authored by Judge SHAPIRO. *Blackwell v Franchi*, 318 Mich App 573 (2017). The appellate court reasoned that although the trial court had correctly concluded that plaintiff was a licensee, *id*. at 572 n 2, it nonetheless erred by granting summary disposition in favor of defendants because there was "a

[1] Plaintiff also brought a claim on the basis of private nuisance, a claim dismissed by the trial court and not at issue here.

question of fact about whether an average user acting under the conditions existing when plaintiff approached the mud room would have been able to discover the drop-off upon casual inspection," *id*. at 578. "The determination of whether defendants had a duty to warn plaintiff of the drop-off depends on how the conflicting testimony regarding whether the drop-off was open and obvious is resolved." *Id*. at 579.[2]

Defendants sought leave to appeal in this Court, and we directed the Clerk to schedule oral argument on the application and the parties to address the following issue:

> [W]hether the appellants owed a duty to warn the appellee of the condition on the land at issue, given the general rule that "[a] landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved," *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596 (2000). [*Blackwell v Franchi*, 501 Mich 903 (2017) (second alteration in original).]

II. STANDARD OF REVIEW

This Court reviews de novo the grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118 (1999). "Whether a defendant owes a particular plaintiff a duty is a question of law that this Court reviews de novo," *Bailey v Schaaf*, 494 Mich 595, 603 (2013), and is "an issue solely for the court to decide," *Murdock v Higgins*, 454 Mich 46, 53 (1997) (quotation marks and citation omitted).

III. ANALYSIS

"The starting point for any discussion of the rules governing premises liability law is establishing what duty a premises possessor owes to those who come onto his land." *Hoffner v Lanctoe*, 492 Mich 450, 460 (2012). "Michigan has recognized three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee." *Stitt v Holland Abundant Life Fellowship*,

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[2] Judge K. F. KELLY, dissenting, stated that she would have affirmed the trial court on the basis that "[p]laintiff should have realized the danger posed by entering a dark and unknown room." *Id*. at 582 (K. F. KELLY, J., dissenting). Judge GLEICHER responded in a concurrence that "darkness may impair a plaintiff's visibility to the extent that an otherwise observable danger no longer qualifies as open and obvious" and "the record hints of no clues that would have raised a suspicion of a significant elevation differential before continuing ahead." *Id*. at 580, 582 (GLEICHER, J., concurring).

462 Mich 591, 596 (2000). In all cases, however, "both the possessors of land and those who come onto it [must] exercise common sense and prudent judgment when confronting hazards on the land." *Hoffner*, 492 Mich at 459.

"[T]he adult social guest is to be viewed as a licensee." *Preston v Sleziak*, 383 Mich 442, 453 (1970), overruled in part on other grounds by *Stitt*, 462 Mich 591. Plaintiff, an adult social guest of defendants, was accordingly a licensee.

> "The explanation usually given by the courts for the classification of social guests as licensees is that there is a common understanding that the guest is expected to take the premises as the possessor himself uses them, and does not expect and is not entitled to expect that they will be prepared for his reception, or that precautions will be taken for his safety, in any manner in which the possessor does not prepare or take precautions for his own safety, or that of the members of his family." [*Preston*, 383 Mich at 451, quoting 2 Restatement Torts, 2d, § 330, comment *h*, p 175.]

In *Preston*, this Court adopted § 342 of the Restatement in specifically setting forth the duty owed by a premises possessor to a licensee:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved. [*Preston*, 383 Mich at 453 (quotation marks omitted).]

More recently, in *Stitt*, this Court explained that "[a] landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Stitt*, 462 Mich at 596. "The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit." *Id*.

"Different floor levels in private and public buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons." *Garrett v WS Butterfield Theatres, Inc*, 261 Mich 262, 263 (1933). Generally, therefore, "steps and differing floor levels [are] not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614 (1995). "[W]here there is something

unusual about the steps, because of their 'character, location, or surrounding conditions,' then the duty of the possessor of land to exercise reasonable care remains." *Id*. at 617, quoting *Garrett*, 261 Mich at 263-264.

Here, there was nothing at all unusual about the step itself from the hallway into the mudroom. By all indications, the step was of a normal size and was in an ordinary location—the entranceway from the hallway into the mudroom. Furthermore, while the step was allegedly concealed by darkness, there is nothing to suggest that defendants had reason to expect that plaintiff would not in a timely manner discover the step. There was a door-sized entrance point separating the hallway from the mudroom and common sense suggests that where two discrete areas of a home are separated by such an entranceway, it is a reasonable possibility that the floor levels may well be different. This is particularly true where such mudrooms, as is often the case, are adjacent to garages, because garages are often themselves not level with the home, rendering mudrooms a common transition point from the garage to the home.[3] A prudent person should anticipate the possibility that floor levels could well be different in such circumstances. Moreover, there was a *light switch* on the hallway wall next to the mudroom entrance, by which a prudent person could have easily illuminated the mudroom. In my judgment, a prudent person does not blindly walk into a dark room, especially one that may be at a different floor level, when there is available a simple means of illuminating the room.[4] Defendants had every right to expect that plaintiff was such a prudent person who would

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[3] The following deposition exchange between plaintiff's counsel and defendant Dean Franchi illustrates the parties' understanding of a "mudroom":

> *Q*. It's usually a room where, you know, you would take your shoes off or put your coat up or sometimes there's laundry in it and it leads to the garage?
>
> *A*. Yes.

[4] See *Brusseau v Selmo*, 286 Mich 171, 174 (1938) ("In the case at bar, plaintiff had notice of the darkened hallway. He could have had more light either by turning on the 'switch' or leaving the entrance door wide open, or by both. His failure to make use of appliances that would have lighted the stairway precludes his recovery."). Although *Brusseau* was decided on the basis of contributory negligence, I believe that it would today likely be resolved on the basis of duty. This is because *Brusseau* was decided when Michigan followed a scheme of contributory negligence and during that time, issues of duty in premises-liability cases were often cast as issues of such negligence. *Bertrand*, 449 Mich at 614 ("Before this Court adopted comparative negligence, the issue of openness and obviousness often arose as the affirmative defense of contributory negligence, which completely barred recovery."). Regardless of how

turn on the light and see the step, or at a minimum decline to walk into a darkened room without even the most cursory effort to determine whether it was safe to do so. That is, defendants had every right to expect that plaintiff would discover the step and avoid falling into the mudroom. See 25 ALR2d 599, 600, § 2 (explaining that a social guest can recover from a social host for failure to warn of a defect in the premises only when the social host "knows the guest will not, in the exercise of reasonable care, discover and avoid for himself" the danger); Restatement, § 342, comment *f*, p 212 ("The possessor is entitled to expect that the licensee . . . will be on the alert to discover conditions which involve risk to him. Indeed, it is not necessary that the condition be such as the licensee would discover by the use of his senses while upon the land."). Because defendants should not have expected that plaintiff would fail to discover the step, the "duty to warn" was not triggered and they cannot be held liable for her injuries. *Preston*, 383 Mich at 453.[5]

In ruling that plaintiff's claim could proceed to trial, the Court of Appeals rejected the argument that plaintiff's failure to turn on the light had any relevance to the question of duty: "Defendants . . . argue that the drop-off, or height differential, was open and obvious because plaintiff could have turned on a light switch located at the entry to the mud room that would have illuminated the mud room. However, this argument goes to whether plaintiff was comparatively negligent; it does not affect duty." *Blackwell*, 318 Mich App at 578. This reasoning badly misses the mark. As an initial matter and as the trial court creditably recognized, the open and obvious danger doctrine applies to *invitees*, not to licensees. *Hoffner*, 492 Mich at 460 ("[A]n integral component of the duty owed to an *invitee* considers whether a defect is 'open and obvious.' ") (citation omitted; emphasis added); *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425 n 2 (2008) ("[A] premises owner has a duty

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Brusseau was resolved, that decision illustrates that this Court recognized decades ago that the law expects that people will avail themselves of easily available means of illuminating dark areas—e.g., an ordinarily placed light switch—and generally cannot recover for injuries suffered when they choose instead to proceed in the dark. This is merely a specific application of the overarching rule of premises liability that a premises possessor "is not under legal duty to prevent careless persons from hurting themselves." *Garrett*, 261 Mich at 264.

[5] To the extent that plaintiff alleges that defendants may be held liable for failure to affirmatively illuminate the mudroom, I disagree for the simple reason that "[t]he landowner owes no [affirmative legal] duty . . . to make the premises safe for the licensee's visit." *Stitt*, 462 Mich at 596. See also *Brown v Berles*, 234 Mich 353, 355-356 (1926) ("[M]ere want of a light in the stairway did not constitute negligence rendering defendant liable to one falling down the stairs. . . . It is common in private homes, especially in the country, to have dark stairways to cellars and basements, and no one ever considered such a want of care.").

to exercise reasonable care to protect *an invitee* from an unreasonable risk of harm caused by a dangerous condition on the premises, but not when the condition is 'open and obvious.' ") (citation omitted; emphasis added).[6] But even more importantly, the duty to warn owed by a

[6] Indeed, in addressing the open and obvious danger doctrine in leading cases such as *Bertrand* and *Lugo*, this Court cited §§ 343 and 343A of the Restatement. *Bertrand*, 449 Mich at 610-611; *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517 (2001). Those two sections of the restatement are located in "Title E. Special Liability of Possessors of Land to Invitees." Restatement, p 215 (capitalization altered). Thus, the Restatement recognizes that the open and obvious danger doctrine is limited to *invitees*. Although this Court's order suggests that the open and obvious danger doctrine applies to licensees and the concurrence is "puzzled" by my assertion to the contrary, neither the order nor the concurrence has cited any authority from this Court applying that doctrine to licensees. Indeed, if the open and obvious danger doctrine applies to licensees, I am puzzled as to why the authors of the Restatement chose to place discussion of that doctrine in a section of the Restatement that is devoted exclusively to the duty owed to invitees.

Concluding that the open and obvious danger doctrine applies to licensees would create a conflict in our law. This is because part of the open and obvious danger doctrine is that a premises possessor owes an affirmative duty to alleviate the presence of certain unusual conditions of the land that have "special aspects." *Hoffner*, 492 Mich at 462 ("[T]his narrow 'special aspects' exception recognizes there could exist a condition that presents a risk of harm that is so unreasonably high that its presence is inexcusable, even in light of its open and obvious nature."). "[I]n resolving an issue regarding the open and obvious doctrine, the question is whether the *condition of the premises* at issue was open and obvious and, if so, whether there were special aspects of the situation that nevertheless made it unreasonably dangerous." *Lugo*, 464 Mich at 523. But in *Stitt*, we explained that a premises possessor "owes *no duty* of inspection or affirmative care *to make the premises safe* for the licensee's visit." *Stitt*, 462 Mich at 596 (emphasis added). Thus, if the open and obvious danger doctrine applies to licensees, it would follow that a premises possessor would owe an affirmative duty to licensees to alleviate the presence of certain conditions of the land—those that possess "special aspects"—which would be contradictory to *Stitt*.

That the open and obvious danger doctrine, which establishes one component of the duty owed by a premises possessor, is limited to invitees is important to recognize because there are several critical distinctions between the duty owed to invitees and the duty owed to licensees, and conflating the two would elevate the duty owed to licensees. For example, concerning invitees, a premises possessor is

premises possessor to licensees is only implicated when the premises possessor "should expect that they will not discover or realize the danger[.]" *Preston*, 383 Mich at 453 (quotation marks and citation omitted). Accordingly, a social host is entitled to expect that social guests reasonably will discover for themselves commonplace potential dangers on the land without the assistance of an affirmative warning. A social host, in my judgment, is entitled to expect that a social guest will not proceed blindly into a dark room but will instead use a light switch to illuminate a room and thereby discover potential dangers within that room.[7] Therefore, the reason why defendants cannot be held liable to plaintiff for her injuries is *not* that she failed to turn on the light before entering the mudroom. While her failure to do so is indeed a matter of comparative negligence, defendants cannot be held liable because they

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subject to liability if he or she " 'knows or *by the exercise of reasonable care would discover* the condition . . . .' " *Bertrand*, 449 Mich at 609, quoting Restatement, § 343, p 215 (emphasis added). That is, a premises possessor owes an invitee a duty to affirmatively "inspect the premises" for dangerous conditions of the land. *Stitt*, 462 Mich at 597. With regard to licensees, in contrast, a premises possessor must simply " 'know[] or [*have*] *reason to know* of the condition . . . .' " *Preston*, 383 Mich at 453, quoting Restatement, § 342, p 210 (emphasis added). That is, with regard to licensees, a premises possessor must be aware of facts that would give him or her reason to know of a dangerous condition of the land; there is no duty to affirmatively inspect the premises. Restatement, § 342, comment *d*, p 211 ("A possessor of land owes to a licensee no duty to prepare a safe place for the licensee's reception or to inspect the land to discover possible or even probable dangers."). Simply put, the law imposes a lesser duty on premises possessors, typically homeowners, who host social gatherings because "[t]he use of the premises is extended to [the licensee] merely as a personal favor to him." Restatement, § 330, comment *h*, p 175. It is simply incompatible with the nature of that relationship that homeowners who show hospitality to a social guest thereby be burdened with a *legal* duty to scour their premises, and affirmatively rearrange their domestic living arrangements, in order to identify or alleviate any condition that might conceivably cause harm to those guests.

[7] Common sense suggests that there is a risk associated with entering an unfamiliar dark room. Thus, the darkness of the room here was a warning that an unknown condition, dangerous or not, might await a social guest, such as plaintiff, on the other side. Once again, a "[d]efendant is not under [a] legal duty to prevent careless persons from hurting themselves." *Garrett*, 261 Mich at 264. Defendants had the *right* to expect that plaintiff herself would recognize the risk of walking into an unfamiliar dark room. Accordingly, defendants were under no obligation to warn plaintiff of the step, and I find the concurrence's focus on comparative negligence not to be relevant in any way.

were entitled to expect that plaintiff would "be on the alert to discover conditions which involve[d] risk" to her. Restatement, § 342, comment *f*, p 212.[8]

In the end, "the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes." *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 242 (2013) (quotation marks, citations, and brackets omitted). Accordingly, the common law simply reflects the practices and common sense of society. See, e.g., *Gildersleeve v Hammond*, 109 Mich 431, 438 (1896) (explaining that "sound reason, common sense, and common honesty . . . are the foundation of the common law"). And it is a simple fact that countless social gatherings in Michigan successfully function, and have from time immemorial, on the straightforward, unstated premise that social guests are reasonably aware that walking blindly into the dark, or otherwise acting in a careless manner, may result in injury. Therefore, my conclusion is not only compelled by common sense, but as a result it is also consistent with our common law.

A contrary conclusion creating a *legal* obligation to warn social guests concerning the pitfalls of walking into dark rooms would hardly define the full extent of our decision. Instead, countless other legal obligations, limited only by the creativity and innovativeness of the bench and bar, would certainly be imposed upon homeowners. Would a host in directing a guest to her bathroom be legally obligated to provide a detailed warning, or otherwise supply a map of the bathroom, to the effect that a failure to turn on the light might cause the guest to run into a sink or bathtub? Would a host be legally obligated to explain to a guest why it is a poor idea to place her hand upon a stove being used to

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[8] Simply stated, in determining whether a duty is owed by the premises possessor to a licensee, a proper analysis includes whether the premises possessor should expect that the licensee will not discover or realize a danger. See *Preston*, 383 Mich at 453. In other words, this analysis concerns the premises possessor's *expectations* of the licensee's conduct. The concurrence does not appear to disagree that premises possessors, such as defendants here, should have reasonably expected that a licensee, such as plaintiff, would turn on the light, but the concurrence proceeds to reason that the failure to turn on the light "may very well be relevant to apportioning damages under comparative negligence principles." I agree that plaintiff's failure to do so may well be relevant in a comparative-negligence analysis, but the concurrence does not explain *why* the presence of the light switch and defendants' reasonable expectations of plaintiff's conduct in relation to the light switch are not critical elements of the analysis of the *threshold* question of duty. "[T]he adoption of comparative negligence in this State has no effect on the basic duty a defendant owes to a plaintiff." *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 99 (1992) (quotation marks and citation omitted).

prepare dinner? And would a host be legally obligated to apprise guests of the assorted and sundry risks of dealing with cutlery, throw rugs, fireplaces, spilled drinks, stairways, and rickety chairs? If not, why are *those* legal obligations any different from the legal obligation to warn a guest about the risks of blindly confronting a darkened room?[9] It is in

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[9] Our caselaw with respect to licensees has suggested that darkness simply cannot constitute a circumstance that "conceals" a danger. In *Habina v Twin City Gen Electric Co*, 150 Mich 41, 48-49 (1907), this Court ruled in favor of the defendant and against the plaintiff, assuming that she was a licensee, explaining that the condition of the land "was concealed only by the darkness of the night. The case is ruled, in principle, by [*Reardon v Thompson*, 149 Mass 267 (1889)], and against the contentions of [the plaintiff]." In *Reardon*, Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, stated that "the general rule is that a licensee goes upon land at his own risk, and must take the premises as he finds them. An open hole, which is not concealed otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril." *Reardon*, 149 Mass at 267. Accordingly, under *Habina*, a licensor cannot be liable to a licensee in premises liability for a condition of the land that is "concealed only by the darkness of the night." *Habina*, 150 Mich at 49. See also *Erickson v Soyars*, 356 Mich 64, 71 (1959) ("The court did not err in instructing the jury that if the hole could have been seen in daylight by any person making reasonable use of his normal faculties then failure to do so may constitute contributory negligence and the hole was not rendered a 'hidden peril' by reason of the darkness of night.").

Courts of other states have similarly concluded that a premises possessor cannot be held liable for injuries suffered by a licensee because the condition of the land was "concealed" by darkness. See, e.g., *Fuchs v Huether*, 154 Mont 11, 15 (1969) ("At the most it may be said that the step was concealed by darkness and since the licensee must take the premises as he or she finds them, the owner is not liable for a danger that is only concealed by the darkness of night and which is easily avoided by the exercise of ordinary caution."), abrogated on other grounds by *Brown v Demaree*, 272 Mont 479 (1995); *Elliman v Gombar*, 86 Ohio App 352, 355 (1949) (" 'The duty which rests upon a licensee to take his license subject to its concomitant perils still exists when he passes along a path obscured by the darkness of night. Indeed, that darkness but accentuates his perils and risks and is a condition for which the licensor is in no wise responsible.' "), quoting *Coleman v Renesch*, 18 Ohio App 177, 180 (1923); *Susquehanna Power Co v Jeffress*, 159 Md 465; 150 A 788, 792 (1930) ("The only sound reason that the traveler could assign for his failure to see that the heavy superstructure and deck of the bridge were gone was the fog of a freezing winter night.

the nature of the common law that it *reflect* social customs and practices and not *lead* society in new directions that might be favored by the court. Having been presented in this case with nothing that would suggest an evolution or transformation in the customs and practices of the people concerning the social host/social guest relationship, I would be content to maintain and preserve the present common law of this state.

IV. CONCLUSION

I would reiterate today the principle of our common law that a social host may not be held liable for injuries suffered by a social guest from an allegedly dangerous condition of the land when the host had no reason to expect that the guest would reasonably fail to discover the condition. That is, hosts are not required to monitor or surveil their guests to ensure that they do not suffer injury from commonplace household conditions, conditions to which the hosts and their families themselves are ordinarily and routinely subject. Here, plaintiff was injured when she stepped into the darkened mudroom without turning on the light or otherwise ascertaining that it was safe to enter. In my judgment, the law should not hold defendants liable when they had no reason to expect that plaintiff—or any other guest—would fail to exercise their own reasonable precautions. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the trial court's grant of summary disposition in favor of defendants. Because this Court fails to do so today and instead remands to the Court of Appeals to address the issue of duty—the very issue that we instructed the parties to address in our order nearly nine months ago—I respectfully dissent. I would not further delay a decision by this Court, if it is ever now to come, by requiring the parties to traverse the appellate process a second time in what I view as a matter involving the straightforward application of the settled common law of this state.

ZAHRA and WILDER, JJ., joined the statement of MARKMAN, C.J.

Summary Disposition July 27, 2018:

PEOPLE v NELSON, No. 156272; Court of Appeals No. 336861. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate

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Even if the plaintiff had been a licensee, the darkness would not have made the defendants responsible."); *O'Donnell v Electro-Motive Div of Gen Motors Corp*, 148 Ill App 3d 627, 635 (1986) ("[O]ur courts have repeatedly held that it is not willful and wanton misconduct for a landowner to fail to warn a licensee of a dangerous condition concealed only by darkness since such a danger is not considered hidden."); *Free v Furr*, 140 Cal App 2d 378, 384 (1956) ("The fact that the darkness of the night increased the hazard involved in using the premises did not increase the licensee's rights or enlarge the licensor's duties with respect to the condition of the premises.").

the sentence of the Berrien Circuit Court, and we remand this case to the trial court for resentencing. The court assigned 25 points to Offense Variable (OV) 13, MCL 777.43, based upon charges that were dismissed in accordance with the plea agreement, but the record provides no evidence to support the conclusion that the defendant committed a third crime against a person. *People v Francisco*, 474 Mich 82 (2006). Before any alleged crimes may be used to score OV 13, the prosecution must prove by a preponderance of the evidence that the crimes actually took place, that the defendant committed them, that they are properly classified as felony "crimes against a person," MCL 777.43(1)(c), and that they occurred "within a 5-year period" of the sentencing offense, MCL 777.43(2)(a).

MARKMAN, C.J. (*dissenting*). I respectfully dissent from the order vacating defendant's sentence and remanding to the trial court for resentencing on the basis that "the record provides no evidence to support the conclusion that the defendant committed a third crime against a person." Offense Variable (OV) 13 is properly scored at 25 points where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]" MCL 777.43(1)(c). However, a review of the record indicates that there is evidence that defendant committed the necessary predicate crimes against the victim: (1) the first-degree criminal sexual conduct offense in the house, to which defendant admitted guilt during the plea hearing; (2) a "rape" at the Motel 6, which the victim herself identified in the presentence investigation report (PSIR); and (3) accosting a minor for immoral purposes, which was established by a text message set forth in the PSIR. It is true that the trial court did not explicitly articulate each of these crimes when defendant challenged the 25-point score for OV 13 in that court, perhaps because that court incorrectly understood defendant's challenge as grounded in *People v Lockridge*, 498 Mich 358 (2015). The reduction of 25 points in defendant's OV score alters defendant's guidelines minimum sentence range from 126-210 months to 81-135 months. I would not remand, as the majority does, for resentencing but would remand to the trial court to *either* articulate an evidentiary basis for its original sentencing ruling *or* resentence defendant absent the points assessed for OV 13. See, e.g., *People v Harper*, 498 Mich 968 (2016).

PEOPLE V REID, No. 157147; Court of Appeals No. 339127. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Lapeer Circuit Court for a determination whether the defendant is indigent, and if so, for the appointment of appellate counsel in light of *Halbert v Michigan*, 545 US 605 (2005). Appointed counsel may file an application for leave to appeal the defendant's October 6, 2016 plea-based conviction to the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within six months of the date of the circuit court's order appointing counsel. The defendant, through no fault of his own, was deprived of the opportunity to have appointed appellate counsel file a timely motion to withdraw the plea and application for leave to appeal due to the trial court's failure to timely respond to the defendant's January 3, 2017 request for counsel

pursuant to MCR 6.425(G)(1)(a) and the trial court's corresponding delay in ordering transcripts. We do not retain jurisdiction.

PEOPLE v GILLIS, No. 157343; Court of Appeals No. 341360. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the trial court was authorized to order the defendant to pay a fine. In all other respects, leave to appeal is denied.

LAKELAND NEUROCARE CENTERS v EVEREST NATIONAL INSURANCE COMPANY, No. 157461; Court of Appeals No. 340349. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

LAKELAND NEUROCARE CENTERS v EVEREST NATIONAL INSURANCE COMPANY, No. 157463; Court of Appeals No. 340346. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied July 27, 2018:

PEOPLE v CARROLL, No. 155376; Court of Appeals No. 335657.

HILL v CITY OF FLINT, No. 155745; Court of Appeals No. 330003.

PEOPLE v GARDNER, No. 155768; Court of Appeals No. 336809.

PEOPLE v CHRISTIEN MARTIN, No. 156168; Court of Appeals No. 336764.

PEOPLE v KOVARY, No. 156184; Court of Appeals No. 338956.

PEOPLE v CLAY, No. 156490; Court of Appeals No. 328236.

COLBURN HUNDLEY, INC v WEST MICHIGAN DEVELOPERS, INC, No. 156525; Court of Appeals No. 333201.

PEOPLE v LINTZ, No. 156575; Court of Appeals No. 338669.

PEOPLE v WILKINS, No. 156628; Court of Appeals No. 332430.

PEOPLE v GOMEZ, No. 156633; Court of Appeals No. 339375.

PEOPLE v NICHOLSON, No. 156652; Court of Appeals No. 338544.

PEOPLE v GRABINSKI, No. 156692; Court of Appeals No. 339226.

PEOPLE v JAQUAN WILSON, No. 156693; Court of Appeals No. 337551.

PEOPLE v BROADNAX, No. 156721; Court of Appeals No. 338127.

PEOPLE v HUDSON, No. 156752; Court of Appeals No. 339350.

PEOPLE v SNYDER, No. 156753; Court of Appeals No. 340093.

PEOPLE v DENT, No. 156764; Court of Appeals No. 340103.

PEOPLE v MICHAEL JACKSON, No. 156778; Court of Appeals No. 340360.

PEOPLE v ROSCOE MARTIN, No. 156783; Court of Appeals No. 338830.

FEZZANI v VILLAGOMEZ, No. 156800; Court of Appeals No. 331751.

PEOPLE v GORDON, No. 156811; Court of Appeals No. 333851.

MAROKY v ENCOMPASS INDEMNITY CO, No. 156833; Court of Appeals No. 333489.

PEOPLE v BRAND, No. 156841; Court of Appeals No. 337723.

PEOPLE v ROBERT SMITH, No. 156863; Court of Appeals No. 339585.

PEOPLE v ZACCHEAUS WILSON, No. 156865; Court of Appeals No. 340213.

PEOPLE v SHEPARD, No. 156866; Court of Appeals No. 338179.

PEOPLE v PLATTE, No. 156872; Court of Appeals No. 337739.

PEOPLE v CLARKE, No. 156893; Court of Appeals No. 332480.

PEOPLE v RALEIGH, No. 156897; Court of Appeals No. 338623.

PEOPLE v LANDERS, No. 156910; Court of Appeals No. 339683.

JARRETT-COOPER v UNITED AIRLINES, INC, No. 156913; Court of Appeals No. 331383.

PEOPLE v WATERS, No. 156914; Court of Appeals No. 338459.

JARRETT-COOPER v UNITED AIRLINES, INC, No. 156915; Court of Appeals No. 333836.

PEOPLE v PEREZ, No. 156921; Court of Appeals No. 334031.

PEOPLE v OSTROWIECKI, No. 156923; Court of Appeals No. 337806.

PEOPLE v DEVANTE CARTER, No. 156927; Court of Appeals No. 338905.

PEOPLE v AARON ZEMKE, No. 156933; Court of Appeals No. 339962.

PEOPLE v BONNER, No. 156936; Court of Appeals No. 338910.

PEOPLE v HENRY ALLEN, No. 156938; Court of Appeals No. 339468.

PEOPLE v SEELEY, No. 156948; Court of Appeals No. 339036.

PEOPLE v CAMPBELL, No. 156952; Court of Appeals No. 340132.

PEOPLE v ALICIA ZEMKE, No. 156957; Court of Appeals No. 339906.

PEOPLE v BURNS-CRAWFORD, No. 156960; Court of Appeals No. 339576.

PEOPLE v BENNETT, No. 156975; Court of Appeals No. 338668.

PEOPLE v CARGLE, No. 156983; Court of Appeals No. 338630.

PEOPLE v MCQUIRTER, No. 156995; Court of Appeals No. 340822.

PEOPLE v VAINAVICZ, No. 157000; Court of Appeals No. 338898.

NEWTON v MARINERS INN, No. 157004; Court of Appeals No. 332498.

MORRIS v BALES, No. 157008; Court of Appeals No. 334493.

PEOPLE v UPSHAW, No. 157013; Court of Appeals No. 340437.

PEOPLE v JONATHON JONES, No. 157018; Court of Appeals No. 338461.

PEOPLE v ALAN WOOD, No. 157040; Court of Appeals No. 339144.

PEOPLE v NOBLES, No. 157042; Court of Appeals No. 338879.

PEOPLE v WATTS, No. 157044; Court of Appeals No. 339174.

PEOPLE v EAVES, No. 157062; Court of Appeals No. 340473.

PEOPLE v ARBABE, No. 157082; Court of Appeals No. 335505.

PEOPLE v RODEA, No. 157083; Court of Appeals No. 339218.

PEOPLE v JOHNSON, Nos. 157100 and 157101; Court of Appeals Nos. 339238 and 339240.

PEOPLE v KOVARY, No. 157119; Court of Appeals No. 338731.

BATTON-JAJUGA v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 157145; reported below: 322 Mich App 422.

PEOPLE v DYE, No. 157146; Court of Appeals No. 334062.

PEOPLE v MAZZIO, No. 157153; Court of Appeals No. 334213.

PEOPLE v BEALS, No. 157156; Court of Appeals No. 338846.

PEOPLE v ALVIN HARRIS, No. 157158; Court of Appeals No. 334633.

PEOPLE v ARTHUR PRINGLE, No. 157183; Court of Appeals No. 339717.

PEOPLE v FORD, No. 157186; Court of Appeals No. 341254.

PEOPLE v CHRISTOPHER WASHINGTON, No. 157191; Court of Appeals No. 340939.

PEOPLE v ERIC BROWN, No. 157217; Court of Appeals No. 340836.

ADAMS v MICHIGAN REFORMATORY WARDEN, No. 157229; Court of Appeals No. 341170.

PEOPLE v RUKES, No. 157233; Court of Appeals No. 334665.

PEOPLE v TENELSHOF, No. 157236; Court of Appeals No. 339697.

WILSON v DEAN, No. 157241; Court of Appeals No. 334243.

PEOPLE v RIVERS, No. 157243; Court of Appeals No. 333936.

PEOPLE v JAMES BROWN, No. 157246; Court of Appeals No. 339422.

PEOPLE v MYRON WILLIAMS, No. 157251; Court of Appeals No. 340783.

NEAL v IONIA CORRECTIONAL FACILITY WARDEN, No. 157252; Court of Appeals No. 339788.

PEOPLE v ROBERT WILLIAMS, No. 157253; Court of Appeals No. 340108.

PEOPLE v BREDERNITZ, No. 157260; Court of Appeals No. 339304.

PEOPLE v TREMAYNE ANDERSON, No. 157261; Court of Appeals No. 341143.

DUCKWORTH v CHEROKEE INSURANCE COMPANY, No. 157266; Court of Appeals No. 334353.

PEOPLE v FETTERMEN, No. 157280; Court of Appeals No. 339841.

PEOPLE v VOGELSANG, No. 157282; Court of Appeals No. 341244.

PEOPLE v PHELIX PRINGLE, No. 157305; Court of Appeals No. 341226.

PEOPLE v FOLEY, No. 157308; Court of Appeals No. 341169.

PEOPLE v ABDEL-SALEM, No. 157315; Court of Appeals No. 334395.

PEOPLE v LEE, No. 157324; Court of Appeals No. 334920.

PEOPLE v ROGERS, No. 157339; Court of Appeals No. 341891.

PEOPLE v HUBLICK, No. 157344; Court of Appeals No. 341287.

PEOPLE v WORD, No. 157345; Court of Appeals No. 334970.

PEOPLE v SHANK, No. 157352; Court of Appeals No. 321534.

PEOPLE v HENRY ANDERSON, No. 157358; reported below: 322 Mich App 622.

PEOPLE v SCOTT SMITH, No. 157363; Court of Appeals No. 341675.

PEOPLE v RAMOS, No. 157373; Court of Appeals No. 341387.

PEOPLE v SIMS, No. 157377; Court of Appeals No. 334464.

PEOPLE v WATKINS, No. 157379; Court of Appeals No. 341085.

PEOPLE v MACK HOWELL, No. 157381; Court of Appeals No. 335449.

PEOPLE v PENZA, No. 157387; Court of Appeals No. 341834.

PEOPLE v DWAYNE SMITH, No. 157389; Court of Appeals No. 340911.

PEOPLE v GARY DENNIS, No. 157394; Court of Appeals No. 334963.

PEOPLE v LOWIS, No. 157409; Court of Appeals No. 341680.

PEOPLE v TYRONE HOWELL, No. 157415; Court of Appeals No. 331901.

PEOPLE v TAYLOR, No. 157419; Court of Appeals No. 340045.

HAYES v DEPARTMENT OF TREASURY, No. 157420; Court of Appeals No. 336206.

PEOPLE v MIKOWSKI, No. 157439; Court of Appeals No. 341760.

PEOPLE v BEAUDIN, No. 157441; Court of Appeals No. 335575.

PEOPLE v GILLIAM, No. 157442; Court of Appeals No. 341593.

PEOPLE v BEAL, No. 157454; Court of Appeals No. 341700.

MARBLY v ROBERTSON, No. 157455; Court of Appeals No. 333286.

PEOPLE v BOBBY BROWN, No. 157457; Court of Appeals No. 341678.

PEOPLE v BYERS, No. 157458; Court of Appeals No. 335610.

PEOPLE v DAVID BROWN, No. 157462; Court of Appeals No. 342321.

PEOPLE v HUBLICK, No. 157466; Court of Appeals No. 341300.

PEOPLE v DARIUS JONES, No. 157467; Court of Appeals No. 341840.

PEOPLE v RAYMON SMITH, No. 157468; Court of Appeals No. 341553.

PEOPLE v EUGENE JACKSON, No. 157471; Court of Appeals No. 341874.

PEOPLE v WORD and $4,941.00 US CURRENCY v CITY OF SOUTHFIELD, No. 157474; Court of Appeals No. 340317.

LEAVINE v GEMBARSKI, No. 157485; Court of Appeals No. 336094.

PEOPLE v LOCKETT, No. 157495; Court of Appeals No. 341978.

PEOPLE v MOORE, No. 157497; Court of Appeals No. 341637.

PEOPLE v SCOTT, No. 157503; Court of Appeals No. 340937.

KRAKE v AUTO CLUB INSURANCE ASSOCIATION, No. 157507; Court of Appeals No. 333541.

PERKOWSKI v CHRYSLER GROUP, LLC, No. 157508; Court of Appeals No. 336386.

PEOPLE v BERRY, No. 157511; Court of Appeals No. 341583.

PEOPLE v CUMMINGS, No. 157523; Court of Appeals No. 336940.

SANDERS v MCLAREN-MACOMB, No. 157524; reported below: 323 Mich App 254.

PEOPLE v BENTLEY, No. 157530; Court of Appeals No. 334632.

PEOPLE v DEXTER WILLIAMS, No. 157531; Court of Appeals No. 335401.

PEOPLE v HENRY, No. 157532; Court of Appeals No. 334881.

PEOPLE v RICE, No. 157540; Court of Appeals No. 333634.

PEOPLE v KISSNER, No. 157550; Court of Appeals No. 335602.

PEOPLE v AUSTON, No. 157553; Court of Appeals No. 341644.

PEOPLE v JEFFREY RUTLEDGE, No. 157557; Court of Appeals No. 336246.

PEOPLE v NADEAU, No. 157559; Court of Appeals No. 336853.

PEOPLE v WORD, No. 157560; Court of Appeals No. 340430.

LANDON v CITY OF FLINT, Nos. 157571, 157572, and 157573; Court of Appeals Nos. 338200, 338201, and 338202.

PEOPLE v BLANCHARD, No. 157588; Court of Appeals No. 334167.

PEOPLE v KING, No. 157668; Court of Appeals No. 337186.

WHITE v DETROIT EAST COMMUNITY MENTAL HEALTH, No. 157683; Court of Appeals No. 340740.

PEOPLE v WOODMAN, No. 157760; Court of Appeals No. 342542.

PEOPLE v WARDEN, No. 157776; Court of Appeals No. 340002.

PEOPLE v WARDEN, No. 157778; Court of Appeals No. 340003.

HAYES v DEPARTMENT OF TREASURY, No. 157791; Court of Appeals No. 336437.

PEOPLE v BOYD, No. 157816; Court of Appeals No. 342555.

ZHANG FINANCIAL, LLC v WALSH, No. 157931; Court of Appeals No. 342779.

Application for Leave to Appeal Held in Abeyance and Application for Leave to Appeal as Cross-Appellant Denied July 27, 2018:

PEOPLE v KATHLEEN WILLIAMS, No. 157565; reported below: 323 Mich App 202. It appearing to this Court that the cases of *People v Davis* (Docket No. 156406) and *People v Price* (Docket No. 156180) are pending on appeal before this Court and that the decisions in those cases may resolve an issue raised in the present application for leave to appeal, we order that the application be held in abeyance pending the decisions in those cases. The application for leave to appeal as cross-appellant is also considered, and it is denied.

Reconsideration Denied July 27, 2018:

PEOPLE v RUCKER, No. 156284; Court of Appeals No. 337141. Leave to appeal denied at 501 Mich 1080.

FILAS v SALISBURY, No. 156462; Court of Appeals No. 331458. Leave to appeal denied at 501 Mich 1037.

PEOPLE v CAIN, No. 156500; Court of Appeals No. 337966. Leave to appeal denied at 501 Mich 1074.

PEOPLE v WELLS, No. 156642; Court of Appeals No. 339542. Leave to appeal denied at 501 Mich 1038.

PEOPLE v MARCOTTE, No. 156657; Court of Appeals No. 332852. Leave to appeal denied at 501 Mich 1060.

PEOPLE v BUTLER, Nos. 156686 and 156687; Court of Appeals Nos. 339183 and 339184. Leave to appeal denied at 501 Mich 1038.

DONALDSON v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 156758; Court of Appeals No. 337502. Leave to appeal denied at 501 Mich 1039.

DONALDSON v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 156760; Court of Appeals No. 337586. Leave to appeal denied at 501 Mich 1039.

PEOPLE v BELINDA JONES, No. 156835; Court of Appeals No. 330113. Leave to appeal denied at 501 Mich 1061.

PEOPLE v WRIGHT, No. 156998; Court of Appeals No. 333488. Leave to appeal denied at 501 Mich 1062.

POPE v BARTLETT, No. 157353; Court of Appeals No. 342446. Leave to appeal denied at 501 Mich 1055.